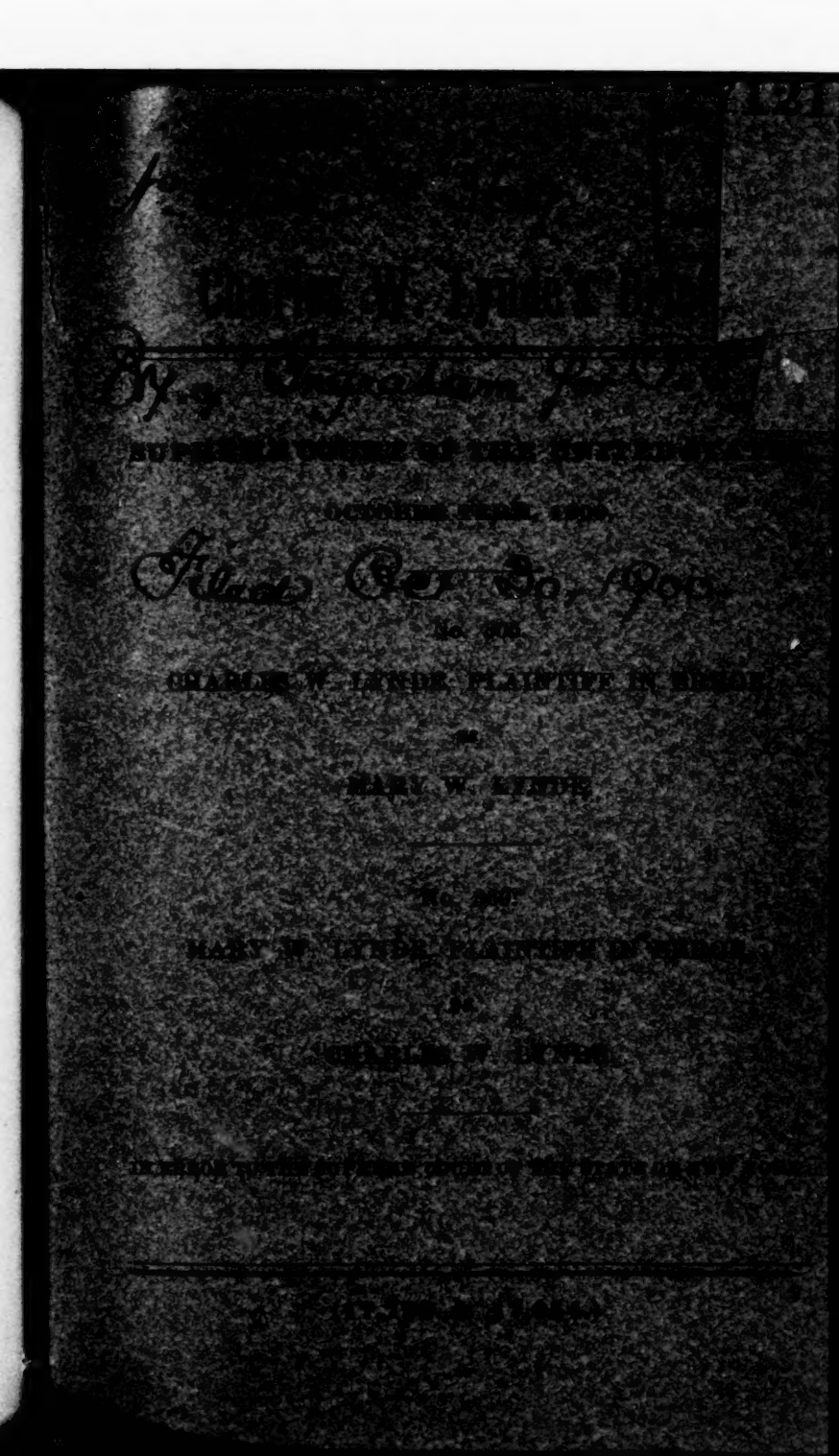

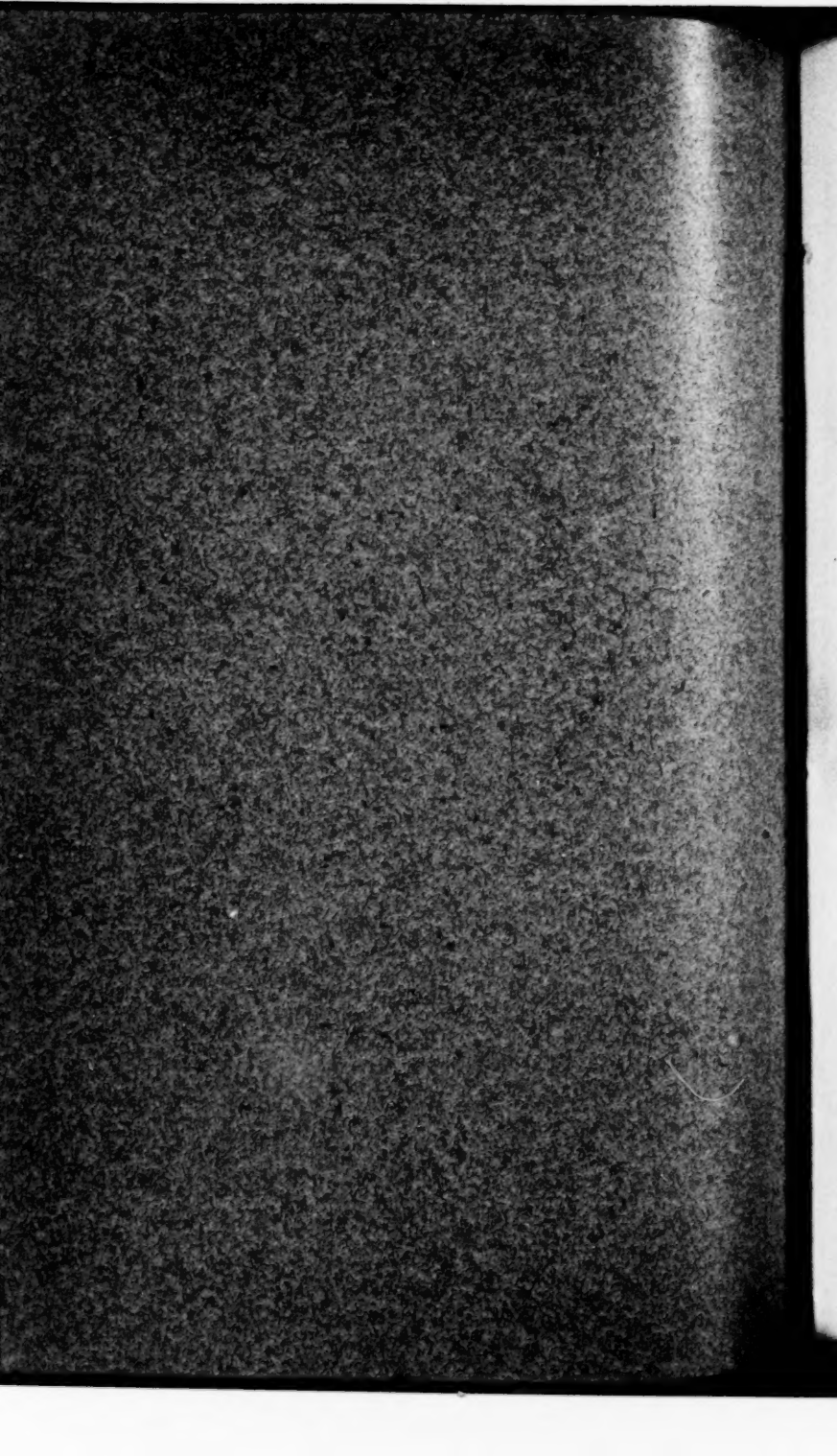

Supreme Court

OF THE UNITED STATES.

CHARLES W. LYNDE,
Plaintiff in Error,

vs.

MARY W. LYNDE,
Defendant in Error.

Statement.

This was an action to enforce in the Courts of the State of New York an alimony decree of the Court of Chancery of the State of New Jersey. The parties were Charles W. Lynde and his former wife, Mary W. Lynde. For purposes of convenience, hereinafter they are not referred to in their numerous legal titles, but simply as Mr. and Mrs. Lynde. The case is reported in 162 N. Y., 405, and in 41 App. Div., 280.

The New York Courts have all held that the New Jersey decree was valid; and the trial Court in that State also held that Mrs. Lynde was entitled, in New York, to the same equitable relief by way of a receivership, &c., against Mr. Lynde, as the Courts of New Jersey granted her. The New York Appellate Courts, however, overruled the Trial Court on this point, and Mrs. Lynde has come to this Court on that question.

Mr. Lynde's brief on that point immediately follows this brief. In the present brief, Mr. Lynde maintains that the alimony decree is unenforceable in every respect, inasmuch as he was thereby deprived of his property without due process of law.

Said alimony decree is based upon a concededly (Point II.) void decree of divorce in said Court of Chancery. The proceedings in New Jersey are set forth in full in the complaint in the New York action, which complaint extends through page 56 of the printed case.

The material facts are as follows: On March 25th, 1884 (page 2), Mr. and Mrs. Lynde were married in New Jersey and lived together for almost four years. At the expiration of that time they separated. In 1893 Mr. Lynde had ceased to be a resident of New Jersey, and in that year (page 60), upon service of the citation by publication, Mrs. Lynde obtained in New Jersey an absolute divorce against Mr. Lynde because of his alleged desertion. It was admitted by the complaint (page 2) in the New York action, and was uncontradicted by the testimony at the trial in that State (page 83), and is part of the findings (pages 60 and 61) that, at the time of the recovery in said Court of Chancery of New Jersey, of the original decree of divorce in 1893, Mr. Lynde was not a resident of New Jersey, and that since that time he has not been a resident of that State. It is further alleged in said complaint, and found (page 60) that Mr. Lynde was served with the summons in said New Jersey action, by publication, and that he did not appear therein prior to the decree [complaint, page 3, affidavit of Mrs. Lynde (page 13), incorporated in complaint (pages 2 and 3) and in findings (page 60), and also in the order amending the decree in New Jersey (page 37), which order is

incorporated in findings (page 61 and see page 60)].

The third paragraph (page 60) of said findings is as follows: "III. That, as defendant could not "be found within the State of New Jersey, the "process which had been duly issued pursuant to "said petition, was duly served upon said defend-"ant by publication."

In Mrs. Lynde's affidavit, just above referred to, and made a part of the complaint, it is alleged (page 13), that "the said defendant did not appear "in said cause at any time during the progress "thereof, either in person or by solicitor."

The Chancellor's opinion (page 34) and made a part of the complaint (page 8), also shows these facts, for it is there said (page 34), "When the pe-"tition was filed, the defendant was not resident "in the State, and upon proof of that fact, he was "proceeded against as a non-resident or absent "defendant. Notice was duly published and " mailed to him, which expressly declared that the " suit was for divorce from the bond of matri-" mony and for alimony." The defendant was " not served with process and did not appear in " the suit."

Mr. Lynde did not reply to the above charge of desertion for the very good reason that he was then in Australia, and did not know of the pendency of the action. His uncontradicted testimony (page 83), is as follows: "Q. When the decree of " divorce dissolving the marriage was obtained " against you, where did you live, or where were " you? A. I was in Australia. Q. Did you hear " of it before or after it was granted? A. I heard " of it after it had been decided."

It is thus apparent that Mrs. Lynde obtained an *ex parte* decree. The date (page 10) thereof is August 7th, 1893.

The decree provided (page 11), that the marriage between the parties should be dissolved, and that "the said parties, *and each of them*, are, and is "hereby freed and discharged from the obligation "thereof." In this decree of 1893 (pages 10, 11 and 60), there was no provision in any form as to alimony.

On February 10, 1896, Mrs. Lynde made a petition (pages 11 and 12) to the effect that (page 12) she had no means, and that (page 12) Mr. Lynde, at the time of the divorce and shortly prior (page 13) to the date of the petition, had no means; but that (page 12) Mr. Lynde had since inherited a fortune from his father, and that (page 12) she had intended to have the said decree of divorce so drawn that, if Mr. Lynde after the date thereof grew wealthy, she might apply for alimony; but that, through the inadvertence of her solicitor, the alimony provision was omitted.

This petition was presented to the New Jersey Court of Chancery. On February 14th, 1897, said Court (page 17), directed Mr. Lynde to show cause on February 24th, 1897, why the prayer of the petition should not be granted. That prayer was as follows (page 12): "Wherefore your "petitioner prays that your Honor will be pleased "to vacate the enrollment, open the said decree and "amend the same by decreeing that reasonable "alimony be paid to her by the defendant, and to "grant unto your petitioner a writ of *ne exeat* "*republica* issuing out of and under the seal of "this Honorable Court, to restrain the said "defendant, Charles W. Lynde, from departing "out of the jurisdiction of this Court, and that "your petitioner may have such other and further "relief as may be equitable and just."

On the return day of said order to show cause, it would seem (pages 4 and 77) that the motion

was adjourned to a later date. On said later date, and throughout this motion before the Chancellor to amend the decree, Mr. Lynde appeared by Mr. Potts, his solicitor. When Mr. Potts appeared, the testimony is undisputed that he raised the objection that no alimony could be awarded; and for the reason that Mr. Lynde had not been served with process in New Jersey, when said decree of divorce was obtained. The testimony on this point was brought out in part at the trial in New York, of the action herein to enforce in said State, the decree of the New Jersey Court of Chancery. Mr. Potts' testimony, as to raising the objection to jurisdiction is, as was said, uncontroverted. He testified as follows (page 77): "Q. Did you, "upon the order, raise any question as to the "jurisdiction of the Court? A. Yes, sir. Q. And "in what form did you raise that question? A. "On the ground that the defendant had never been "served with process, and, therefore, alimony "could not be granted for that purpose, and on "other grounds." Mr. Potts was neither contradicted nor cross-examined on this point, and the opinion of the Chancellor shows (page 35) that the question was before him.

The jurisdictional objection was overruled by the Chancellor. On the appeal in New Jersey to the New Jersey Court of Errors and Appeals, from said Chancellor's order, Mr. Lynde's attorney again raised the same objection. The first paragraph (page 39) in the petition on appeal from said order, is as follows: "Your petitioner appeals "from said order * * * upon the ground "that the same is erroneous, for that

"First. Alimony cannot be decreed after final "decree duly enrolled against a defendant who was "not served with process for appearance and did

"not appear in the original cause, and had no "property within the control of the Court."

Later, as will be shown, Mrs. Lynde sought to enforce her New Jersey decree in the State of New York. In her complaint in New York, Mrs. Lynde alleged (page 6) that the final decree of December 28, 1897, was duly made and that "said "Court of Chancery had jurisdiction of the person "of said defendant" &c. This was denied (page 57) by Mr. Lynde's answer. And at the trial in New York, exemplified copies of said decree of divorce, and the papers in the case were offered in evidence. The jurisdictional objection was then again taken as follows (pages 71 and 72).

"Defendants attorney: I object to the offer of "the papers down to and including what I shall "term the original judgment for divorce, upon the "ground of want of jurisdiction of the Court to "render that judgment; overruled; exception. "It appearing from the papers that the defendant "was neither served personally within the State "of New Jersey, or that he appeared therein, "down to the time of that judgment." * * *

Mr. Lynde, after the trial, also excepted (page 67), and generally on this point (pages 66 and 67) to the findings of the trial Court in New York to the effect that "in obedience to the order to show "cause why the prayer of the petition should not "be granted, the defendant appeared generally, "and submitted to the jurisdiction of the Court," &c. There is in the case absolutely no evidence which seeks to contradict the fact that, on each of the occasions above specified, the jurisdictional objection was duly raised. The Appellate Division in its opinion concedes that such objection was raised. Judge Bartlett, for that Court, says (page 102: "Upon the trial of the present case, Mr. Potts

"testifies that he did question the jurisdiction of "the Court of Chancery in the amendment pro- "ceeding, on the ground that the defendant had "never been served with process, and on other "grounds; and the grounds specified in his peti- "tion of appeal to the Court of Errors and Appeals "also relate to the jurisdiction of the Chancellor."

The Trial Court (pages 70 and 71), however, and the Court of Appeals in New York, in their opinions fall into the error of saying that no jurisdictional objection was raised. The Trial Court (page 71) says: "In obedience to the order to show cause "why the prayer of the petition should not be "granted, the defendant appeared and submitted "to the jurisdiction of the Court. He did not "object to the validity of the original decree."

Judge Gray, for said Court of Appeals, says (page 114): "Upon service of the order of the "Chancellor, directing him to show cause why the "petition of the plaintiff for the amendment of "the decree of divorce should not be granted, he "appeared in the proceeding, without any reserva- "tion of record, and without making any objection "to the jurisdiction of the Court." * * * "In short, he appeared and submitted himself to "the jurisdiction of the Court, appealing to its "consideration of the facts and not objecting to "its power to proceed, not repudiating the divorce, "but relying upon it." This same error appears again and again throughout Judge Gray's opinion. It will later appear, from the assignment of errors to this Court, that Mr. Lynde raises the same jurisdictional objection. Indeed, since he left the New Jersey Courts, he does, and can, from the necessity of the case, raise no other objection. And this jurisdictional objection has been insisted upon throughout from Mr. Lynde's first appearance in the New Jersey motion. It is hereafter shown

that none of the fundamental facts were ever considered by the Court, after the entry of the concededly void decree of divorce.

Mr. Potts' objections, including said jurisdictional objection, were on said motion overruled by the Chancellor, who handed down a memorandum (page 18), which directed that affidavits should be taken to ascertain whether it was Mrs. Lynde's intention to have the provision of alimony omitted from the decree of divorce, or whether such omission resulted from the inadvertence of her solicitor.

On April 15th and 29th, and on May 1, 1896, testimony (pages 18–33) on this point was taken before different Masters of the New Jersey Court of Chancery.

Thereafter (pages 33-36) in said Court of Chancery, after a review of said testimony, the Chancellor handed down an opinion in favor of Mrs. Lynde and holding that Mrs. Lynde intended at the date of the original petition to apply for alimony; and that such amendment might, according to New Jersey practice, be made *nunc pro tunc*. And, by an order granted on October 26th, 1896, the decree was so amended.

Mr. Lynde (page 38), appealed from said order to the New Jersey Court of Errors and Appeals; and on June 28th, 1897, said Court affirmed said order.

On the above motion to amend the decree Mrs. Lynde's attorney had made an affidavit that Mr. Lynde had inherited (page 12) about $525,000; but this was denied (page 41) by Mr. Lynde and (page 42) by Mr. Lynde's brother, who swore (page 42) that Mr. Lynde was unable to pay any alimony; as it was then thought that the claims of creditors against his father would exhaust the estate. So, on October 27, 1896 (the day after the granting of said Chancellor's order amending the decree by

allowing an application for alimony), a notice of motion (pages 45 and 46) was served on Mr. Potts by Mrs. Lynde's attorney, "for an order referring "this matter to a Master to ascertain and report "whether alimony should be allowed to petitioner, "and if so, how much." This motion was returnable November 2, 1896. On the return day the complaint alleges (page 6) that the motion was adjourned one week. On the adjourned day the motion was abandoned. After the Court of Errors and Appeals affirmed the Chancellor's order, Mr. Potts testifies (page 78) that a new notice of motion for an order of reference was served upon him. This second order of reference was granted (page 47) July 12th, 1897. Mr. Potts was no longer served with any notice of the different motions in the alimony proceedings, as is shown by the recitals in the Master's report (page 47) and the decree (page 51), &c. Those were served upon Mr. Lynde out of the State of New Jersey. In the answer (page 57) Mr. Lynde swore that, after the above amendment of the decree, he was not served personally, in New Jersey, with any notice or process in said action. No claim to the contrary thereof was made at the trial.

Thereafter, on December 28, 1897 (page 52) and upon the Master's report (pages 47–49) it was decreed (pages 52 and 53) that Mrs. Lynde recover of Mr. Lynde $7,840 back alimony, and $80 per week future alimony, and $1,000 counsel fee; and that upon Mr. Lynde's default in paying any of said sums, a receiver of Mr. Lynde's property might be appointed. And thereafter (pages 54–56) such receiver was appointed.

Thereafter Mrs. Lynde recovered no property in New Jersey, and brought an action, in the State of New York, to enforce the New Jersey decree. The facts above recited (except of course, those facts

which are stated to have been brought out at the trial in New York) all appear in the papers annexed to the said complaint, and made part thereof, "as if therein set forth in full." *All of said facts are admitted by the pleadings or are proved by uncontroverted evidence* And we may say in this statement, that we shall not have to repeat it in the different points, that we concede if there is conflicting evidence as to a question of fact and the lower Court has made findings, this Court will not open the question of fact; but we further claim if, as did Mr. Lynde in this case, a party "duly excepted to the findings and conclusions, it is well settled that exceptions to alleged findings of fact because unsupported by evidence, present questions of law reviewable in Courts of Error." Laing v. Rigney, 160 U. S 531 at page 540.

The above complaint in the New York action (page 2) alleged anew that Mr. Lynde had deserted Mrs. Lynde, and also that he had been intemperate and cruel to Mrs. Lynde; which allegations were denied (page 56) by Mr. Lynde's answer in that action.

We earnestly desire that the exact facts may be understood by this Court. We feel that heretofore we have been unfortunate in that the Courts of New York, with perhaps the exception of the Appellate Division, have decided this case on supposed facts, which a more thoughtful perusal of the record would not only have shown to have no existence, but also that no one has claimed that they had any existence.

To resume briefly as to the facts above set forth:

Mrs. Lynde, in 1893, obtained from Mr. Lynde an absolute divorce on the ground of desertion. Mr. Lynde was then a non-resident. At the time, he was in Australia. He was served by publica-

tion and did not know of the pendency of the action till the decree was entered. The decree made no provision in any form for alimony. In 1896, a motion was made by Mrs. Lynde, to amend the decree by allowing her to apply for alimony. Mr. Lynde appeared in opposition to this motion. We concede that he did not qualify his appearance by the technical expression, that such appearance was "for the purposes of the motion." In Point IV, however, we show that on such motion, he could, in reality, have contested nothing else. The motion was decided in Mrs. Lynde's favor. Thereafter, alimony was awarded. The following two points, and those only, were determined after Mr. Lynde's appearance, to-wit: First. Mrs. Lynde, by the New Jersey Rules of Practice, had the right to have the form of the decree amended so as to allow her to apply for alimony; and it was also decided that, in 1893, the alimony clause was omitted from the decree of divorce by inadvertence.

Second. The amount of alimony was determined.

We concede that this Court cannot review the New Jersey decree on the first point, and, if the New Jersey Courts had the right to fix any alimony, then we concede that this Court will not, of course, review the New Jersey Court's discretion as to its amount. Our claim all through the case, however, has been that the New Jersey Court was absolutely without jurisdiction to grant any alimony decree whatsoever.

These two points were determined, not at the trial, but in a proceeding long after the void fundamental decree as to the alleged desertion was entered. And, before and after said two points were determined, by his jurisdictional objection, Mr. Lynde raised his protest that he had had no opportunity to be heard on the *funda-*

mental issue, to wit: *his alleged desertion. Of this fact there is no dispute.* And there is no proof nor claim in the record that Mr. Lynde ever had his day in Court on the question of his desertion which is the only basis for the alimony decree.

It is to be noticed that in Mr. Lynde's answer, in New York, he denied the allegations of Mrs. Lynde's New York complaint, as to desertion. No confusion, however, should arise from this fact. Mrs. Lynde's said allegation as to Mr. Lynde's alleged desertion, was evidently inserted by her New York attorney, in the New York complaint, for its supposed effect upon the Court. Mr. Lynde, finding such allegation in said complaint, felt called upon to deny the same. Of course at the trial in New York, no proof was offered on this allegation. Such proof would have been utterly irrelevant, as New Jersey was the State where the action was commenced, and the Courts of that State alone had jurisdiction of the subject. The action in New York was to enforce the New Jersey decree, and not to put new provisions therein. By a familiar rule of pleading, the answer in New York to the then irrelevant allegations of desertion did not put the matter in issue. We fear that confusion, however, has arisen from this fact, as the New York Courts refer to Mr. Lynde's appearance as a general appearance; and to his arguing in the New Jersey Court of Chancery, the application to amend the decree on its merits. With an objection to jurisdiction, we concede that he may have argued the *particular application* on its merits; but nevertheless, the effect of the overruling of said jurisdictional objection was, that he never was allowed an opportunity to argue the *merits of the action.* Likewise, his so-

called general appearance was *on the motion or motions* after the void decree, and when, as above shown, he had no opportunity to be heard on the fundamental issues. We quote the Chancellor's opinion (page 68), and which opinion was even made a part (page 8) of Mrs. Lynde's own complaint in New York, as to how far Mr. Lynde could be heard on the merits of the action, after his said appearance. The Chancellor overruled Mr. Lynde's jurisdictional objection; and, after hearing the testimony as to Mrs. Lynde's intention as to alimony, said (page 37), "*The decree will be amended without "being opened.*" The amendment to which the Chancellor referred was of course the provision allowing an application for alimony. And yet, in the Court of Appeals of New York, Judge Gray says (page 116): Mr. Lynde "cannot now attack the final decree of the Court collaterally, after having had his day in Court," though as we have seen, notwithstanding Mr. Lynde's jurisdictional objection, he never had his day in Court on the merits of the action.

At the trial in New York Mrs. Lynde's attorney called an expert on New Jersey law. The testimony in our case relates largely to a legal discussion as to the enforceability of the alimony decree. In view of this fact, we here give, as appears from the evidence, Mrs. Lynde's attorney's theory of the case. We have thought it proper in the same connection to give the theory of the different New York Courts and a summary of our own theory of the case, though of course we shall reserve for the points our full discussion of the legal propositions.

Mrs. Lynde's attorney's theory of the case:

The expert called by Mrs. Lynde's attorney con-

ceded that the original decree was void, but his idea was, because the form of the decree was amended and at that time Mr. Lynde appeared by Mr. Potts and put in the so-called general appearance, that therefore the decree was enforceable. In other words, as Mrs. Lynde's attorney had coaxed Mr. Lynde within the jurisdiction of the Courts of New Jersey, those Courts could take his property away without due process of law. They could decline to give Mr. Lynde an opportunity to be heard on the fundamental issue, as they did in this case, and Mr. Lynde would be bound by the order. So far this theory has prevailed.

In support of these statements as to our adversary's theory we quote from the testimony:

At the trial in New York Mrs. Lynde's said expert as to the law of New Jersey testified (page 72) that he was a Master in Chancery in New Jersey and that he had examined the proceedings in this case, and that by the law of New Jersey, if (page 73) the decree of divorce in this case had originally reserved the question of alimony, under the New Jersey law Mrs. Lynde could not have recovered alimony if Mr. Lynde was not served in New Jersey, or did not appear. Then (page 74) said expert was asked: "Q. Do you mean to say that if that had "been in the original judgment, that the plaintiff "then could have proceeded against this defendant, "whether he was personally served within the "State or appeared therein? A. No, sir, he could "not; I have already answered that. Q. So the fact "upon which you base your opinion that this de-"cree is effective in the State of New Jersey, and "would operate against the property of this de-"fendant is upon the ground that the defendant "appeared upon the application which resulted in

"this order amending the decree? A. Yes, sir." On cross-examination said expert testified (pages 74 and 75). "Q. Now, you have been asked about "the order being made *nunc pro tunc*, do you "mean that the consequence of the defendant ap- "pearing after that amendment--suppose he ap- "pears to resist the motion and the result of the "motion is as I have stated, do you mean to say "that the Court by simply adding the words that "it may be dated *nunc pro tunc* thereafter makes "his appearance binding upon him for subsequent "applications when it would not have been other- "wise? A. I mean to say that where this order "is made *nunc pro tunc* and he appears in that "action, the Court obtains jurisdiction. Q. Do "you mean if he appears prior to that? A. No, "sir. Q. Do you mean to say that if he appears "subsequent to the order making it *nunc pro tunc*? "A. If he appears subsequent to the original de- "cree. Q. Do you mean to say that where the "application is made, as in this action, for ali- "mony, and the Court makes an order that the "decree be amended *nunc pro tunc*, do you mean "to say that his appearance to resist that motion "gives the Court jurisdiction? A. Yes, sir."

Mrs. Lynde's attorney (page 75) showed his theory of the case by propounding this question: "Q. If the amendment took the effect, *nunc pro* "*tunc*, would not the appearance to an application "for alimony, made at any time after the making "of the decree, bring the defendant within the "jurisdiction of the Court? A. Why certainly it "would."

Oddly enough, when Mrs. Lynde's attorney, after the trial in New York, drew his decison for judgment in that State, he took as a basis for said decision the finding in the concededly void original decree of divorce, that (page 60) Mr.

Lynde "had been guilty of wilful and obstinate "desertion of the plaintiff during the term of two "years or more next before the exhibiting or filing "of her said petition." And of this decree, as we shall show later, Judge Gray, in the Court of Appeals, said that "it was ineffectual against the de- "fendant *for any purpose.*"

The New York Trial Court's (pages 70, 71) theory:

This Court (page 71) said Mr. Lynde "did not "object to the validity of the original decree." * * * "He did not object to the jurisdiction of "the Court to entertain the application." On this point the Court was mistaken (see *supra*). That Court also said Mr. Lynde "recognized the validity "of the divorce by remarrying." This suggestion we answer in Point VI, where we show the doctrine has been repudiated by the Court of Appeals of New York.

The New York Appellate Division's theory of the case:

Judge Bartlett, for this Court, admits (page 101) that the original divorce was void, and (page 102) that the jurisdictional objection was duly taken; and says or implies (page 102) that it would have been fatal if Mr. Lynde had confined himself to this objection. As he raised other points, on Judge Bartlett's theory, he lost the benefit of said objection. This suggestion is answered in Point V.

The New York Court of Appeals' theory.

The first sentence (page 114) of this opinion is to the effect that the case might well be decided on Judge Bartlett's opinion. Yet, as we have seen, *supra*, in Judge Bartlett's opinion, it is conceded

that the jurisdictional objection was duly taken, while in Judge Gray's opinion it is said that such objection was not raised.

Judge Gray (page 114) says that the decree of divorce "was ineffectual against the defendant for any purpose." It is not said or implied in this portion of the opinion that the merits of the fundamental action were ever validly settled. As we understand Judge Gray, it is not necessary that they should be, for (page 116) he says: "But "whether its invalidity was cured or not, in the "subsequent proceeding to which the defendant "was a party, a final decree was entered adjudging "that he pay to the plaintiff a certain sum of "money."

It seems thus to be claimed that by some magic Mr. Lynde's alleged general appearance on a motion after judgment relates back in point of time, and, despite his jurisdictional objection, does away with the necessity for a hearing on the fundamental issue of the case.

We show in Point VII how we think that Judge Gray has misapplied Rigney v. Rigney to this case. We have pointed out, *supra*, how Judge Gray has erroneously said that Mr. Lynde made "no objection to the jurisdiction of the Court" to award alimony. The learned Judge, however, made an even more serious error. He seeks in one portion of his opinion (page 117) to give the impression that Mr. Lynde had a hearing on the fundamental issues; for, in Ward v. Boyce, 152 N. Y., 199, there was, as in this case, an original judgment and an ancillary judgment, and the defense was, as we shall show more at length in Point III, that the defendant had no opportunity to defend before the original judgment or at any time thereafter. This was precisely the situation in our case.

It will be remembered that Mr. Lynde was served by publication and was in Australia during the pendency of the fundamental action, and did not hear of it until after the decree was entered. Indeed, the lack of such opportunity has been the great bulwark of the defense (see answer, pages 56 & 57). Again and again in previous briefs, and in this brief, have we pressed it upon the Court's attention. Of the fundamental decree, let us repeat what Judge Gray himself said in an earlier part of the opinion: "The decree of divorce which the plaintiff obtained in New Jersey"* * * "was ineffectual against the defendant for any purpose." Again (page 114), Judge Gray says: "It was void for want of personal service of process, or of an appearance by him in the divorce proceedings."

He then proceeds to show how Mr. Lynde was heard on the motion to amend the decree. Not a scintilla of evidence was quoted or could be quoted to show that Mr. Lynde was heard on the fundamental issue of the action, to wit: the question as to whether he was guilty of desertion. That question was settled by that decree, which Judge Gray says "was ineffectual as against the defendant for any purpose." Of that decree the Chancellor said (page 37), at the granting of the motion to insert an alimony provision, "*the matter of the amendment will not disturb the divorce. The decree will be amended without being opened.*" This was said, it will be recalled, after the Chancellor had overruled a jurisdictional objection whereby Mr. Lynde pointed out the invalidity of the basal decree.

Notwithstanding these facts, Judge Gray, in the strongest terms, implies that Mr. Lynde had a hearing on the fundamental issue. For, after citing the facts of Ward v. Boyce, Judge

Gray, in attempting to distinguish that case from the present case (page 117), says: "We held "that the judgment did not conclude Mrs. Ward, "because she was not a party to the proceeding "and was cited to appear at a stage of it when she "had no opportunity to litigate the fundamental "issue. The principal fact had then been adjudged, "that the indebtedness for the cattle, for which "the note was given, was owing to the husband."

These remarks, in this connection, have no meaning, unless they imply that in our case Mr. Lynde was, as Judge Gray puts it "cited to appear at a stage" when he "had an opportunity to litigate " the fundamental issue."

Judge Gray has said (p. 115) "In short, he" *i. e.*, Mr. Lynde, "appeared and submitted himself to "the jurisdiction of the Court, appealing to its "consideration of the facts and not objecting to its "power to proceed; not repudiating the divorce, "but relying upon it. There cannot be the slighest "question that his appearance was general."

The facts are, as we have seen, that Mr. Lynde's jurisdictional objection was at all times raised and that (Point IV) there was no chance for a general appearance, for Mr. Lynde was not afforded an opportunity to be heard on the fundamental issue. We submit that Judge Gray has not been writing about a state of facts that make his remarks pertinent to our case.

We concede that, if the facts of this case were as Judge Gray has assumed them to be, *i. e.*, that we were heard on the fundamental issue (or had an opportunity to be heard thereon), there is no question as to the correctness of his conclusions. With respect, we say that there is in this case no warrant for his assumption of the facts. If Mr. Lynde were heard *on the merits of the action*, why was

Judge Bartlett careful to say that he was heard on the *merits of the particular application.*

Our apology for these extended remarks is, first, that we felt that we could not safely pass unnoticed the suggestion that we were heard on the fundamental decree and, second, we desired in Point III to break the force of the fact that the New York Courts have decided against us, by liberal extracts from the strong opinion of Judge O'Brien, who wrote for the New York Courts in a case which is a twin brother to our case. We know that Ward v. Boyce does not control this Court. We believe, however, that the strong reasoning of the opinion therein will impress this Court.

And we say, with the fullest confidence, that no Court which grasps the admitted facts of this case can reconcile the opinion herein of the Court of Appeals and the opinion in Ward v. Boyce. If our case was decided correctly, then Ward v. Boyce was decided incorrectly. And there is no question but what Ward v. Boyce involved a United States Constitutional question, for the Courts of New York in that case refused to enforce a judgment which had been recovered in a Court of Vermont; and so that case directly involves the national constitutional question, as to giving full faith and credit to the judgment of a sister State.

Mr. Lynde's theory of the case.

The original decree of divorce which had no alimony provision, was and is void (Point II), so far as it can be used as a basis for a judgment *in personam.* The resistance of the application to amend the form of the decree in respect to alimony could not (Point III) galvanize this void decree into life. Especially is this true, when Mr. Lynde,

by his jurisdictional objection, called the Court's attention to the fact that he had never had his day in Court on the fundamental issue. As a rule, if a party appears in an action, as the New York Courts contend, he is bound by the decree therein. This rule, however, presupposes that he will have an opportunity for a hearing on the essential issues.

In the present action, jurisdiction is, as we have seen, not claimed until the ancillary motion was made and by fixing alimony, upon the void decree said Court has not afforded Mr. Lynde an opportunity to be heard on the fundamental issue—indeed, by overruling his jurisdictional objection, has declined to hear him on those issues. The result must be, if said Court ever had any jurisdiction, that said Court thereby lost it and (Point III) that the alimony decree is void. Indeed the complaint itself (page 35) says no alimony can be awarded apart from a divorce. And so does the testimony of Mrs. Lynde's expert (page 73). The test (Point III) of the validity of a decree is, has the party had an opportunity to be heard on the essential issues thereof, therein settled. Unquestionably Mr. Lynde has not had this opportunity. The question herein is thus quite distinct from the question in that line of cases which holds that, if a party appears generally before the issues are settled, he will seek in vain to withdraw from the case and take the Court's jurisdiction with him. The test (Point III) of the validity of the decree, is not as the New York Courts imply—has a party touched his finger to the outside of a void decree, by resisting an application to amend the form thereof. By such ruling, Mr. Lynde has not had an opportunity to prove what he has sworn in his answer (pages 56 and 57) he can prove, to wit.: that Mrs. Lynde,

on the merits, is not entitled to either a divorce or alimony. We think that the true test is epitomized by Mr. Freeman in his Work on Judgments Section 118, Vol. 1, where he says:

"According to the reasoning of the Supreme "Court, the issue and service of process is equival- "ent to a direction to the defendant to appear and "present his defense for the consideration of the "Court; and its refusal, after he does appear, to "hear him or permit him to assert his rights is, in "legal effect, a revocation of its process, and there- "fore it has no other jurisdiction over him than it "had prior to the issuing of such process."

Again it will be recalled that no valid process was issued against Mr. Lynde until the motion was made to amend the form of the decree, but not to disturb the decree.

Mr. Lynde's second marriage (Point VI) has no bearing on the *in personam* decree that has been awarded against him without a hearing.

Assignments of Error.

SUPREME COURT OF THE UNITED STATES.

CHARLES W. LYNDE,
Plaintiff in Error,

vs.

MARY W. LYNDE,
Defendant in Error.

The plaintiff in error in this action, in connection with his petition for a writ of error, makes the following assignments of error, which he avers occurred upon the trial, hearings, proceedings and determination of the cause by the Special Term of the New York Supreme Court, and by both the Appellate Division, Second Department, of said Court and the Court of Appeals of said State, to wit:

I. The Supreme Court of the State of New York, at its Special Term and in its Appellate Division, and the Court of Appeals of the State of New York erred in holding and deciding that a judgment or decree of the Court of Chancery of the State of New Jersey, in favor of the defendant in error and against the plaintiff in error, for an absolute divorce obtained without personal service upon, or appearance by, the plaintiff in error in said action, would sustain a judgment *in personam* against him upon a subsequent application in said action for alimony. The said plaintiff in error never having had his day in court in respect to the matters upon which said judgment or decree of divorce was granted.

II. The said Courts in the State of New York erred in holding and deciding that the Court of Chancery of the State of New Jersey had jurisdiction of the plaintiff in error upon the application for the allowance of alimony and the determination thereof after the attempted amendment of said decree, in which proceeding alimony was granted the defendant in error without personal service upon the plaintiff in error within the State of New Jersey or appearance by him.

III. That said Courts in the State of New York erred in holding and deciding that the appearance of the plaintiff in error herein to resist the application for alimony in the action in the Court of Chancery of New Jersey after the decree of divorce therein was a general appearance, and as such was the equivalent of and a substitute for personal service of original process upon which a personal judgment could be rendered against said plaintiff in error.

By reason of which before-assigned errors this plaintiff in error avers he is being deeply damaged and aggrieved in violation of the provision of the Constitution of the United States, which ordains that no person shall be deprived of his property without due process of law.

And the said Charles W. Lynde, plaintiff in error, prays that the aforesaid judgment and determination may be reversed, annulled and altogether held for nothing.

Dated Brooklyn, N. Y., April 18th, 1900.

GEORGE S. INGRAHAM,
Attorney for Charles W. Lynde,
Plaintiff in Error,
166 Montague Street,
Brooklyn, N. Y.

POINT I.

The power of this Court to review the constitutional question involved in the judgment of the lower Courts is manifest.

A jurisdictional defense is a constitutional defense. The two words are synonymous. (Black's Law dictionary, see "jurisdiction." Winfield's Adjudged Words and Phrases, page 343.) Our jurisdictional defense was set up in the answer. It has throughout been pressed upon the attention of the Court (Statement pages 5 & 7). Practically, it has been our sole defense. To verify this statement, we cite the opinions of the Court. The New York Trial Justice (page 70) said, "The de-"fendant claims that that part of the decree award-"ing alimony was not based upon personal service "upon him or upon his appearance by a solicitor, "and that it is not binding upon him personally "in the State of New Jersey, and hence not en-"forceable in the State of New York."

Judge Bartlett, for the New York Appellate Division (page 101), says, "The defendant's ap-"peal raised two important questions: (1) Had "the Court of Chancery in New Jersey jurisdiction "to render the judgment for alimony against the "defendant?"

Then Judge Bartlett said that if this be so, the second question arises as to the form of relief to which Mrs. Lynde would be entitled. He discussed no other question. Judge Gray in the Court of Appeals said (page 114): "With respect "to the main question, whether the Court of "Chancery of the State of New Jersey acquired "jurisdiction over the defendant to render the "final decree for the payment of alimony, it is "argued, in his behalf, that the decree of divorce

"was invalid as to him and, therefore, afforded no "support for the decree of alimony." On that point Judge Gray cites United States authorities. He discusses at length Laing v. Rigney, 160 U. S., 531, a case which involved questions similar to those raised herein, and of that case Judge Gray says (page 116), it "is much in point." To prove that herein, United States Constitutional questions were raised, we may thus refer to the opinions of the New York Courts.

In O'Neil v. Vermont, 144 U. S., 323, at page 332, as a matter of fact this Court did, for this purpose, refer to the opinion. In Philadelphia Fire Association v. New York, 119 U. S., 110, this Court, for the same reason, examined the opinion of the Court of Appeals of this very State of New York. In Pittsburger and I. Co. v. Cleveland I. M. Co., 178 U. S., 270, Justice McKenna, to show the grounds of the decision, considers the opinion at length. In Sully v. American National Bank, 178 U. S., 289, it was urged, as the plaintiff in error did not raise the constitutional point till he reached the highest State Court, that he was too late, but this Court through Justice Peckham, said at page 298, "In regard to the objection that "even Carhart has raised the question too late, we "think it is without foundation; he raised it in "the Supreme Court and that Court decided it."

We have seen above that in the present case the highest Appellate Court in New York was controlled by Laing v. Rigney (160 U. S., 531). This fact alone is sufficient to induce this Court to review the lower judgment.

Yet in our case, as said, the question was raised throughout. It was set up in the answer. The complaint alleged (page 6) "that the said Court of "Chancery had jurisdiction of the person of the "said defendant." This the answer (page 57) de-

nied. In the third allegation of the said answer it is said (page 57): "Third. For a first separate "defense, defendant alleges that no process was "served upon him in the action mentioned in the "complaint, nor was the defendant at the time "when said action was commenced, or at any time "thereafter, a resident of the State of New Jersey, "and he alleges that the Court making such pre-"tended judgment or decree granting a divorce "had no jurisdiction over this defendant."

For a second, separate defense, defendant alleges:

"That he never appeared in person or by at-"torney in the said action referred to in said com-"plaint, except specially to resist the plaintiff's "motion to amend the judgment or decree therein "also referred to in said complaint, and which said "motion resulted in an order or decree amending "the said judgment or decree in said action by "adding thereto as follows" (quoting amendment):

"Nor did he in any manner authorize any other "or further appearance; and that he was not "thereafter either personally served with any "notice or process in said action in the State of "New Jersery, nor did he appear in any further "or subsequent proceedings in said action, either "in person or by attorney."

By said allegation we referred to the United States Constitution. The opinions herein show that the Courts so understood us. It is capable of demonstration that in reason we could have referred to no other. There are but three constitutions that need be considered, to wit, the New Jersey, the New York and the United States Constitutions.

First. Mr. Lynde could not have referred to the

Constitution of the State of New Jersey, for the Courts of New York require that the Constitution or the laws of a sister State must appear in the record, or they will not take judicial notice of them. Pacific Pneumatic Co. v. Wheelock, 80 N. Y., 278; Hunt v. Johnson, 44 N. Y., 27.

Moreover, the United States Supreme Court, in a case of this kind, will take no judicial notice of the laws of the State of New Jersey, inasmuch as the appeal is not from a judgment of the Courts of New Jersey, but from a judgment of the Courts of New York. Hawley v. Donoghue, 116 U. S., 1 at page 5.

New Jersey Courts are, of course, the ultimate tribunals for decisions of questions under the New Jersey law. If we had been sufficiently in error, in this New York action to rely on that instrument, one would expect us to plead the same. If the Courts in New York considered that instrument, one would likewise expect to see in their opinions some discussion of cases arising thereunder. There is none.

Second. The answer of Mr. Lynde, in New York, could not have referred to the Constitution of the State of New York for the following reason: The original decree was obtained in New Jersey, and so it was immaterial what the constitution of the State of New York required, inasmuch as if the decree was enforceable in New Jersey, under the United States Constitution, then it should be enforced in New York no matter what the local laws of that State may be. Crapo v. Kelly, 16 Wall, 610, 619. Black on Judgments, Secs. 856, 857.

Third. There is left only the Constitution of the United States, that the answer could refer to. Of that Constitution the New York Courts take judicial notice. Abbott's Trial Brief on the Facts,

Sec. 384 Indeed, they must take cognizance of such Constitution. Bridge Proprietors v. Hoboken Co., 1 Wall, 116.

If the proposition were sound—which we shall show is not the case—that the United States decisions required that for a party to avail himself of the United States Constitution, he must plead it, it is submitted that we have complied with the rule for this reason.

This Court leaves to the State Court authority to prescribe in what manner constitutional defenses or any other defenses are to be pleaded.

Commercial Bank v. Rochester, 82 U. S., 639.
Hill v. Mendenhall, 88 U. S., 453.
Hardy v. Johnson, 68 U. S., 37.

By his answer Mr. Lynde pleaded those facts which showed that the provisions of an instrument of which (*supra*) the Courts of that State take judicial notice, had been violated. It is the rule in New York, as it is elsewhere, if you plead the facts, it is not necessary to plead the law.

Springer v. Dwyer, 50 N. Y., 19.
Van Brunt v. Day, 81 N. Y., 251.
Abbott's Trial Brief on the Facts, Sec. 384.
Hawley v. Donoghue, 116 U. S., 1.

Inasmuch, then, as questions of pleading are left to the New York Courts, and inasmuch as upon the facts we have pleaded, those Courts decided the Federal question, it is submitted that in effect we have pleaded the United States Constitution.

Mr. Lynde invoked the aid of the United States Constitution again at the trial in New York when he objected to the decree of divorce as follows (pages 71, 72):

"Defendant's Attorney: I object to the offer of "the papers down to and including what I shall "term the original judgment for divorce upon the "ground of want of jurisdiction of the Court to "render that judgment.

"Overruled; exception.

"It appearing from the papers that the defend- "ant was neither served personally within the "State of New Jersey, or that he appeared therein, "down to the time of that judgment."

Still, as the only question in the case was a question under the United States Constitution, and as the lowest Courts must of necessity, in order to reach the judgment they did reach, pass on a provision of that instrument, the right to review that judgment resides in this Court.

In the case of Furman v. Nichol, 8 Wallace, 44, the Court said: "It is enough for the purpose of "this suit, to say that a cause can be removed from "a State Court into this Court under the 25th Sec- "tion of the Judiciary Act of 1789, whenever some "one of the questions embraced in it was relied "upon by the party who brings the cause here; when "the right he claimed it gave him, was denied to "him by the State Court. It is urged that the par- "ticular provision of the Constitution which the "plaintiffs in error say have been violated in its "application to their case, should be contained in "the pleadings, but this is in no case necessary. "If the record shows either by express averment "or by clear and necessary intendment, that the "Constitutional provision did arise, and that the "Court below could not have reached the con- "clusion it did reach without applying "it to the case in hand, then the jurisdiction of "this Court attaches. And it need not appear

"that the State Court erred in its judgment. It is "sufficient to confer jurisdiction that the question "was in the case, was decided adversely to the "plaintiff in error, and that the Court was in- "duced by it to make the judgment which it did."

In the case of Bridge Proprietors v. Hoboken Company, 1 Wall 116, at page 142, the Court said: "It is objected, however, by the defendants, that "the pleadings did not in words say that the "statute is void because it conflicts with the "Constitution of the United States, and did not "point out the Special clause of the Constitution "supposed to render the act invalid. It would be "a new rule of pleading and one altogether super- "fluous to require a party to set out specially the "provisions of the Constitution of the United "States on which he relies for the action of the "Court in the protection of his rights. If the "courts of this country, and especially this Court "can be supposed to take judicial notice of any- "thing without pleading it specially, it is the "Constitution of the United States; and if the "plaintiff and defendant, in either pleadings, make "a case which necessarily comes within the pro- "visions of that instrument, this Court surely can "recognize the fact without requiring the pleader "to say in words, 'This part of the Constitution is "the one involved in this case.'" This case is cited with approval by Justice Peckham as late as 177 U. S., 66 at page 77.

In Green Bay Canal Company v. Patten Paper Co., 172 U. S., 68, the same case was again cited with approval, and it was shown that the statement in an intervening case was erroneously interpreted to have modified said case. In said case in 172 U. S., at page 68, Judge Shiras said, "No particular "form of words or phrases has ever been declared "necessary in which the claim of Federal rights

"must be asserted. It is sufficient if it appears "from the record that such rights were specially "set up or claimed in the State Court in such man- "ner as to bring it to the attention of that "Court. 'The true and rational rule' this "Court has said in Bridge Proprietors v. Hoboken "Co., 1 Wall. 116, at 143, 'is that the Court "must be able to see clearly from the whole record, "that a certain provision of the constitution or Act "of Congress was relied on by the party who brings "the writ of error, and that the right thus claimed "by him, was denied.' In Roby v. Colehour, 146 "U. S. 153, 159, it was said that, 'our jurisdiction "being invoked upon the ground that a right or "immunity specially set up and claimed under the "Constitution or authority of the United States "has been denied by the judgment sought to be "renewed, it must appear from the record of the "case, either that the right so set up and claimed "was expressly denied or that such was the neces- "sary effect in law of the judgment.' If it appear "from the record by clear and necessary intend- "ment that a Federal question must have been "directly involved, so that the State Court could not "have given judgment without deciding it, that will "be sufficient. Powell v Brunswick County, 150 U. "S. 433 at 440; Sayward v. Denny, 158 U. S. 180; "Chicago Burlington &c., R. R. v. Chicago, 166 U. "S. 226."

To the same effect,

Broughton v. Exchange Bank, 104 U. S. 427:

Dugger v. Bocock, 104 U. S. 603:

Kankauna Co., v. Green Bay Co., 142 U. S. 254.

Likewise the following Works of Practice:

Jurisdiction of the United States Courts by Curtis at pages 35, 40 and 58. This author, as is well known, was *amicus curiae* in Murdock v. City of Memphis, 87 U. S. 590, which case was considered by this Court for nearly two years and settled points of practice as to obtaining writs of error from State Courts.

Foster's Federal Practice (2d Ed) page 1003;
Phillip's on United States Practice, page 179.

In McCullough v. Virginia, 173 U. S. 102 at page 119, Judge Brewer cities the Bridge Proprietors case, and says, "They establish, as far as prece-"dents can establish anything, that it is not neces-"ary to state in terms on the record that the Con-"stitution or law of the United States was drawn in "question. It is sufficient to bring the case within "the provisions of the twenty fifth section of the "Judiciary Act, if the record shows that the Con-"stitution or law, or treaty of the United States "must have been misconstrued, or the decision "could not have been made."

We know that it is sometimes said by this Court that at a trial, a party, by a constitutiona objection, is supposed to be relying on the Constitution of his State. Such remarks do and must refer to those cases where there are in a case Constitutional questions and also questions that involve general principles of law; and second, where the aggrieved party comes directly to this Court from the State where the action was originally tried. We have seen that the Courts below have said that herein only Constitutional questions were raised. Again, Mr. Lynde was sued originally in New Jersey. Neither party came to this Court from the Courts of that State. Mrs. Lynde, however, brought an action in the State of New York against Mr. Lynde. It is thus apparent

that Mr. Lynde's only defense in New York was under the United States Constitution. And it is such questions which we raised in the lower Courts, and in relation to which we are now in this Court. Indeed, we believe that no case can be found where the United Stated Constitutional question were raised by the answer, as it was herein, and this Court declined to hear the question.

To ascertain whether the lower Courts had jurisdiction, this Court may review the lower judgment to the full extent.

In Dewey v. Des Moines, 173 U. S., 193, at page 204, it was said: "A State can no more subject to its "power a single person or a single article of prop- "erty, whose residence or legal status is in another "State, then it can subject all the citizens or all "the property of such other State to its power."

In Thompson v. Whitman, 85 U. S., 457, the syllabus says: "Neither the Constitutional pro "vision, that full faith and credit shall be given "in each State to the public acts, records and "judicial proceedings of every other State, nor the "act of Congress passed in pursuance thereof, pre- "vents an inquiry into the jurisdiction of the "Court by which a judgment offered in evidence "was rendered.

"The record of a judgment rendered in another "State may be contradicted as to the facts neces- "sary to give the Court jurisdiction; and if it be "shown that such facts did not exist, the record "will be a nullity, notwithstanding it may recite "that they did exist."

Also Reynolds v. Stockton, 140 U. S., 254.

POINT II.

The original basal decree of divorce was, and is, void as against Mr. Lynde, for want of jurisdiction.

It was shown in the statement (page 3) that in 1893, Mr. Lynde was in Australia when Mrs. Lynde obtained her divorce, and that Mr. Lynde was served by publication, and that he did not know of the action till after the decree was entered, and that no one assumed to appear for him.

By reason of these facts, as against Mr. Lynde, the fundamental decree is void. At all events, this must be true so far as such decree can be used as a basis of an *in personam* alimony decree. This may be shown in a variety of ways.

In the Chancellor's opinion, annexed to the complaint, and (page 8) made a part thereof, he says (page 35): "As the decree was against the absent "defendant, who was not served with process, did "not appear in the case, and did not have prop- "erty which was under the Court's control, it "could not have given alimony. A judgment *in* "*personam* in favor of the wife, (Brown on Juris- "diction, Sec. 11; 2 Bishop, M. D., & S., Sec. 844; "Brown on Divorce, 267)."

At the trial in New York, Mrs. Lynde called as an expert on New Jersey law an attorney who (page 73) had been associate counsel with Mrs. Lynde's New York attorney in the New Jersey action, and who (page 73) had examined the New Jersey judgment roll and decree. He testified as follows:

"Q. Now, if this clause reserving the question "of alimony which was subsequently inserted in "the judgment, had originally been in that judg- "ment, under the law of New Jersey, could the

"plaintiff have recovered alimony in New Jersey "against the defendant if he neither appeared or "was served within the State? A. No, sir; he "could not."

The Appellate Division, on the appeal herein in New York, has (page 101) said that this decree was void. So has the New York Court of Appeals.

Judge Gray, for that Court (page 114) says: "That the decree of divorce was of no force as to "him," *i. e.*, Mr. Lynde, "cannot be disputed. It "is quite settled, at the present day, that no State "can exercise jurisdiction and authority over per- "sons, or property, without its territory. Its laws, "and the judgments of its tribunals, can have no "extra-territorial operation, except so far as the "former may be allowed such by comity. The de- "cree of divorce, which the plaintiff obtained in "New Jersey, was effectual to determine her status "as a citizen of that State towards the defendant: "but as to him, it affected nothing, and was void "for want of personal service of process, or of an "appearance by him in the divorce proceedings. "One, or the other, of these conditions was re- "quired to be shown to enable the Court to pro- "ceed with jurisdiction *in personam*. As the ser- "vice of process was constructive, by publication, "however authorized by the laws of the State, it "was ineffectual against the defendant for any pur- "pose (People v. Baker, 76 N. Y., 78; Matter of "Kimball, 155 *id.*, 62; Pennoyer v. Neff, 95 U. S., "714; Story's Conflict of Laws, Sec. 539)."

In Pennoyer vs. Neff, 95 U.S., 714, at page 726, Judge Field says: "If without personal service, "judgments *in personam* obtained *ex parte* against "non-resident and absent parties upon mere publica- "tion of process, which in the great majority of cases

"would never be seen by the parties interested, "could be upheld and enforced, they would be "constant instruments of fraud and oppression. "Judgments for all sorts of claims upon contracts "and for torts, real and pretended, would be thus "obtained under which property would be seized, "when the evidence of the transaction upon which "they were founded, if they ever had any existence, "had perished. * * *

"In other words, such service may answer in all "cases which are substantially proceedings *in rem*. "But where the entire object of the action is to de- "termine the personal rights and obligations of "the defendants, that is, where the suit is merely "*in personam*, constructive service in this form "upon the non-resident is ineffectual for any pur- "pose. Process from the tribunals of one State "cannot run into another State, and summon "parties there domiciled to leave their "territory and respond to the proceed- "ings against them. Publication of pro- "cess or notice within the State where the "tribunal sits cannot create any greater obligation "upon the non-resident to appear. Process sent to "him out of the State and process published "within it, are equally unavailing in proceedings "to establish his personal liability." At page 733, it is said, "To give such proceedings any validity "there must be a tribunal competent by its con- "stitution—that is, by the law of its creation—to "pass upon the subject-matter of the suit; and if "that involves merely a determination of the per- "sonal liability of the defendant, he must be "brought within the jurisdiction by service of "process within the State or his voluntary appear- "ance."

As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than

to subject the property of a non-resident to valid claims against him in the State, "due process of "law would require appearance or personal service "before a defendant can be personally bound by "any judgment rendered."

In St. Clair vs. Cox, 106 U. S., 350, at page 353, it is said, "The Courts of the United States only "regard judgments of the State Courts establishing "personal demands, as having personal validity or "as importing verity where they have been ren- "dered upon personal service of the party, or what "is the same thing, of those empowered to re- "ceive process for him, or upon his voluntary ap- "pearance."

To same effect

Harkness vs. Hyde, 98 U. S., 476, at 478.
Owens vs. Henry, 161 U. S., 642, at page 646.
Henrietta M. & M. Co. vs. Johnson, 173 U. S., page 221, at 224.

As shown in part by the complaint, and in part by Mr. Lynde's uncontradicted testimony (page 83), Mr. Lynde left New Jersey in the winter of 1887. He said, "I ceased to be a resident of New "Jersey at that time and have since been a resi- "dent of New York. I have been a resident of New "York two years. I returned from Australia in "1894. That was also in the winter, either January "or February.

"Q. When the decree of divorce dissolving the "marriage was obtained against you, where did "you live or where were you? A. I was in Aus- "tralia.

"Q. Did you hear of it before or after it was "granted? A. I heard of it after it had been de- "cided.

"It is admitted by plaintiff that defendant was a "non-resident of New Jersey at and since the time "of divorce."

The contention is first, that, presumptively, Mr. Lynde ceased, at that time, to be a resident of New Jersey.

The contention is second, that whether this be so or not, for two reasons said fundamental decree as against Mr. Lynde is void, *i. e.*, even though Mr. Lynde continued to be a citizen of New Jersey.

The first reason is, that, as shown above, the Chancellor and Mrs. Lynde's expert have so declared. And this decree can be given no greater effect out of the State of New Jersey than it has in said State.

> Public Works v. Columbia College, 84 U. S., 521.

The second reason is, that Pennoyer vs. Neff and other cases, cited above, show that under the United States Constitution no personal decree can be obtained, as this decree was obtained, against any citizen of any State or Country, and still be valid.

We say this, for, although Mrs. Lynde's expert admitted that the fundamental decree was void, in the New York Appellate Court briefs, Mrs. Lynde's attorneys seemed to lay stress on the fact that the record did not show that Mr. Lynde ceased to be a citizen of New Jersey, although it was shown that he was not a resident of said State. The recent cases in this Court, of Dewey v. Des Moines, 173 U. S., 193; and Cooper v. Newell, *id.*, 555, are to the effect, that by a mere publication of process, such as was made here against Mr. Lynde, no personal judgment can be entered against a *non-resident*. And at the New York Trial it was admitted by Mrs. Lynde's attorney (page 83) that

Mr. Lynde "was a non resident of New Jersey *at* and *since* the time of divorce" It would seem as though a construction would be incongruous which would hold that the protection of the United States Coustitution could be invoked by a citizen of other States, but could not be invoked by a citizen of New Jersey. Again it would seem that, as a plaintiff must prove her cause of action, if, the question of Mr. Lynde's citizenship were at all material, the burden (see Point VIII), would be on Mrs. Lynde to show, by positive testimony, that Mr. Lynde was a citizen of New Jersey.

We also submit that the above positive testimony, as to the fact that this fundamental decree is void, forecloses all discussion as to whether, in the absence of proof to the contrary, the presumption is not—that the service by publication is void (Settlemeir v. Sullivan, 97 U. S., 444, at page 448), inasmuch as (Jacobs on Domicile Section 47) it is contrary to common law principles.

POINT III.

As we have seen, Point II, the fundamental decree is concededly void. Such decree is the sole basis for the alimony decree. Thus the alimony decree must also be void. Especially is this true, inasmuch, as appears in the statement, Mr. Lynde made his jurisdictional objection as to the invalidity of the basal decree and, notwithstanding, was not afforded an opportunity to be heard on the issues purporting to be therein settled.

The jurisdiction to render judgment for alimony is dependent entirely upon the validity of the judgment for divorce. So that if the judgment dissolving the marriage is for any reason void—as it is in this case—(See Point II) so also is the decree for alimony void (see testimony of George H. Bruce, Mrs. Lynde's witness, (page 73), Chancellor's opinion (page 35) and this opinion (page 8) is made a part of the complaint). Said Chancellor's opinion reads (page 35): "As the "decree was against the absent defendant, who "was not served with process did not appear in "the case, and did not have property which was "under the Court's control, it could not have given "alimony. A judgment *in personam* in favor of "the wife (Brown on jurisdiction, Sec. 11; 2 "Bishop M. D & S., Sec. 844; Brown on Di-"vorce, 267).

* * * * * *

"By the unwritten law alimony is not a matter "of independent claim or right (2 Bishop M. D. & "S., Sec. 839; I. *id.*, Sec. 1368). It is incidental "to a bill for divorce or other relief between hus-

"band and wife (Anshutz vs. Anshutz, I. C. E. "Gr., 162; Miller, vs. Miller, Saxton, 386; Yule "vs. Yule, 2 Stoc., 138; Cory vs. Cory, 3 Stock., "400; Rockwell vs. Morgan, 2 Beasley, 119, 121)."

It is not enough for a Court to determine how much, if anything, A owes B, unless it at some time determines A owes B some amount. Now, the Courts below have said that, if anything, Mr. Lynde owes Mrs. Lynde a certain amount, but whether, in fact, he owes her anything at all, depends on whether she has shown that he was guilty of desertion, and Mrs. Lynde is entitled to a divorce therefor. There is no pretense in the case that, after his appearance, Mr. Lynde had an opportunity to be heard on this question. Still Mrs. Lynde's attorney and the Courts, state that Mr. Lynde argued the amount of money, if any, that he should pay, and by this fact, he pleaded to the merits, when the record is uncontradicted that he raised the jurisdictional objection that he had not been heard on the merits of the action, *i.e.*, as to whether he had deserted his wife, and whether she was entitled to a divorce for that reason.

We refer to the opinions themselves in the records and the quotations thereof in the preceding statement, to show that the above remarks convey a correct idea of the theory of this case that has thus been sustained. We merely repeat the following: In the Court of Appeals, Judge Gray said (page 116): "But whether its invalidity was "cured or not, in the subsequent proceeding to "which the defendant was a party, a final decree "was entered adjudging that he pay to the plaintiff "a certain sum of money."

And merely because Mr. Lynde appeared on this motion after the void decree, the invalidity of which it is not pretended was cured, Judge Gray (page 114), has said: "There cannot be the slightest

"question that his appearance is general." Judge Bartlett, as we show in Point V, also says such an appearance was general.

Nothwithstanding their remarks, we submit that it is well settled that a decree is void, which is entered under the above circumstances.

Mr. Works, in his Treatise on Courts and their Jurisdiction, at page 105, says: "The appearance "after a default, and making an ineffectual motion to "set aside the judgment, will not operate as a waiver "of defective service. Nor will an appearance and "contest of the amount of damages after a default, "operate as such waiver. It is only where he de- "sires to defend the action that it is necessary for "the defendant to appear specially and object to "the jurisdiction."

In the first place to enter a decree in this manner is not due process of law.

In Hagar v. Reclamation District No. 108, 111 U. S., 701, at 708, it is said:

"It is sufficient to observe here that by 'due "process' is meant one which, following the forms "of law, is appropriate to the case, and just to the "parties to be affected. It must be pursued in "the ordinary mode prescribed by law; it must be "adapted to the end to be obtained; wherever it is "necessary for the protection of the parties, it "must give them an opportunity to be heard "respecting the justice of the judgment sought. "The clause in question means, therefore, that "there can be no proceeding against life, liberty "or property which may result in the deprivation "of either, without the observance of those general "rules established in our system of jurisprudence "for the security of private rights. (Hurtado v. "California, 110 U. S., 516, 536.)"

In Windsor v. McVeigh, 93 U. S., 274, at 277,

the Court said: "That there must be notice to "the party of some kind, actual or constructive, "to a valid judgment affecting his rights, is ad- "mitted. Until notice is given the Court has no "jurisdiction in any case to proceed to judgment, "whatever its authority may be by the law of its "organization over the subject matter. But notice "is only for the purpose of affording a party "an opportunity to be heard upon the claim "or the charges made; it is a summons for him to "appear and speak if he has anything to say why "the judgment should not be rendered. A denial "to a party of the benefit of a notice would be in "effect, to deny that he is entitled to notice at all; "and the sham and deceptive proceeding "had better be omitted altogether. It would be "like saying to a party, appear and you shall be "heard; and when he has appeared, saying, "Your appearance shall not be recognized and you "shall not be heard." * * *

"The law is, and always has been, that whenever "notice of citation is required, the party cited has "the right to appear and be heard; and when the "latter is denied, the former is ineffectual for any "purpose. The denial to a party in such a case, of "the right to appear, is in legal effect a recall of the "citation to him. * * * In the McVeigh case, "the following remarks by Justice Story are cited "with approval: "It is a rule," said the learned "judge, "founded in the first principles of natural "justice, that a party shall have opportunity to be "heard in his defense before his property is con- "demned, and that charges upon which the con- "demnation is sought shall be specific, determinate, "and clear. If a seizure is made and condemnation "is past without the allegation of any specific "cause of forfeiture or offense, and without any "public notice of the proceedings, so that the

"parties in interest have no opportunity of appear-
"ing and making a defence, the sentence is not so
"much a judicial sentence as an arbitrary sovereign
"edict. It has none of the elements of a
"judicial proceeding and deserves not the
"respect of any foreign nation. It ought to have
"no intrinsic credit given to it, either for its
"justice or its truth, by any foreign tribunal. It
"amounts to little more, in common sense and
"common honesty, than a sentence of tribunal
"which first punishes and then hears the party,
"*castigatque, auditque.* It may be binding upon
"the subjects of that particular nation; but, upon
"the eternal principles of justice, it ought to have
"no binding obligation upon the rights of prop-
"erty of the subjects of other nations, for it
"tramples under foot all the doctrines of interna-
"tional law, and is but a solemn fraud, if it is
"clothed with all the forms of a judicial proceed-
"ing."

In Hovey v. Elliott, 167 U. S., 409, the Trial Term of the Supreme Court of the District of Columbia directed that a defendant's answer be stricken out and judgment given in favor of plaintiff, because defendant was guilty of contempt in failing to pay money into Court. This was held unconstitutional, on the ground that it was taking property away without a hearing.

In the opinion in this case, Mr. Justice White cites, with approval, the above case of Windsor vs. McVeigh. He also cites Galpin v. Page, 18 Wall, 350, at page 368, to the effect that

"It is a rule as old as the law, and never more
"to be respected than now, that no one shall be
"personally bound until he has had his day in
"Court, by which is meant, until he has been duly
"cited to appear, and has been afforded an oppor-
"tunity to be heard. Judgment without such

"citation and opportunity wants all the attributes "of a judicial determination; it is judicial usurp "ation and oppression, and can never be upheld "where justice is justly administered."

At page 446 of said case, Mr. Justice White says: "There is no distinction in principle between "determining a cause upon issues not raised by "the pleadings in the actual absence of the plain- "tiff, and rendering a decree by refusing to "permit a defendant to be heard in his defense, "or to consider the merits of a sufficient defense, "and, indeed, by striking the pleading containing "such defense from the files."

In this case Justice White cites cases to the same effect from many jurisdictions, and at pages 437 to 442 shows that a New York case to the contrary, was against the current of authority.

In the present Lynde case, Mr. Lynde was not given an opportunity (statement, pages 11 & 12) to put in any answer on the merits. It is, therefore, submitted that in this action there has been as clear a violation of that due process of law that is secured by the United States Constitution, as in any of the cases cited above.

In Freeman on Judgments it is said (Vol. I, Sec. 118):

"According to the reasoning of the Supreme "Court, the issue and service of process is equiv- "alent to a direction to the defendant to appear "and present his defense for the consideration of "the Court; and its refusal, after he does appear, "to hear him or permit him to assert his rights is, "in legal effect, a revocation of its process, and, "therefore, it has no other jurisdiction over him "than it had prior to the issuing of such process."

And, at section 121, it is said, "It is now settled

"that a Court may, in effect, abdicate its jurisdic-
"tion over the parties by refusing to hear them
"after they have been regularly brought into Court,
"as when it orders answers to be stricken out
"because they refused to take the oath of loyalty,
"and judgment is therefore rendered, but it is
"void."

Lang v. People, 14 Mich. 439, at page 454, holds as follows: "It has been held quite uniformly that "legal proceedings which do not provide for due "service to the party charged, and which do not "give him a chance to have his rights tested in "a legal way, are not due process of law, and are "in violation of constitutional right Such has "frequently been held by this Court. Hubbard v. "People, 4 Mich., 126; Parsons v. Russell, 11 *id.* "113; Ames v. Port Huron Log Driving and "Booming Co., 11 *id.* 139; Price v. Hopkins, 13 "*id.* 318; Groesbeeker v. Seeley, 13 *id.* 329."

It is seen by the above cases, that the test as to whether an appearance is valid, is whether or not the party has had an opportunity to try all the issues and not as to whether he happened, as the opinions (pages 103, 104 and 115) in New York declare, to have in some form appeared before a supplemental decree was entered. Mr. Lynde has sworn (page 56) that he did not desert Mrs. Lynde And yet, as he put in a so called general appearance, the New York Courts have assumed that he did so desert her. Unless this be so, there is no basis for the alimony decree. This assumption was not due process of law. In Rees v. City of Watertown, 19 Wall. 107, at page 123, it is said: "Whether in fact, the individual has "a defense * * * is not important * * * "To assume that he has none, and therefore that "he is not entitled to a day in Court, is to assume

"against him the very point he may wish to "contend."

Notwithstanding the adverse decisions herein in the State of New York, due largely, as we believe and say with respect, to the fact that the Courts below have been careless in their grasp of the real facts in this case, we say with all confidence, that in no state has our contention under this point, been more sanctioned than in the Courts of New York.

In the early case of Bloom v. Burdick, 1 Hill (N. Y.) 130, it is said, "It is a cardinal principle "in the administration of justice that no man can "be condemned or divested of his right until he "has had an opportunity of being heard; and if "judgment is rendered against him before that is "done, the proceeding will be as utterly void as if "the Court had undertaken to act where the sub-"ject matter was not within its cognizance."

One of the clearest cases in the books on the point that a decree is unenforceable which has for a basis a void decree, is Ward v. Boyce, 152 N. Y., 191, which, as we have shown, involved a federal question. This case was cited by us to the New York Court of Appeals. Judge Gray attempted to distinguish that case from our case. Again, we respect, we say that in his attempt, he forgot for the time the controlling facts of our case. Let us take Judge Gray's statement of the facts of Ward v. Boyce. At page 117 he says, Ward v. Boyce "was upon a promissory note, made by the defend-"ant to the plaintiff's order, and the issue between "the parties was as to the plaintiff's ownership. "The defendant claimed that the record of a "certain proceeding in a Justice's Court, in the "State of Vermont was conclusive evidence that "the note was not her property, but was that of her " husband. The proceeding in the Vermont Court

"was by way of trustee process and was instituted "by a creditor of Mr. Ward, this plaintiff's hus- "band, against him and Boyce, the maker of the "note, as his debtor. Ward was a non-resident, "did not appear, and judgment went against him "by default. Boyce, the other defendant, ap- "peared and stated that he gave the note to Mrs. "Ward for cattle purchased, and he asked that she "be cited to appear. A citation was served upon "her in the State of Vermont, to show cause why "the note should not be adjudged to be held as her "husband's property by his creditor." Then Judge Gray says, "We held that the judgment "did not conclude Mrs. Ward, because she was "not a party to the proceeding and was cited to "appear at a stage of it, when she had no oppor- "tunity to litigate the fundamental issue. The "principal fact had then been adjudged, that the "indebtedness for the cattle, for which the note "was given, was owing to the husband; and this in "a special statutory proceeding, in which the Court "had acquired no jurisdiction by service of any "process upon him, or upon his wife, who held the "note. When she was cited, it was not that she "might contest the validity of the judgment against "her husband but merely to show cause why the "note should not be adjudged as her husband's "property and to be held by his creditor."

We have attempted to show in the statement that notwithstanding Judge Gray's observation, in the respect that no opportunity was afforded the defendant to contest the fundamental issues, Ward v. Boyce and the present case are identical. A perusal of the record herein will show this fact beyond all dispute.

Judge Gray attempts to make one more distinction between the two cases, which we believe to be

equally untenable. He says *supra* Ward v. Boyce was a "special statutory proceeding."

In the first place, the New York Courts hold that all divorce actions are statutory and so Judge Bartlett has pointed out in his opinion in this very case. At page 104 Judge Bartlett says: "The "proposition that the Courts of this State have no "jurisdiction over the subject of divorce except as "they derive it from statute has quite recently "been reasserted by the Court of Appeals (Walker "v. Walker, 155 N. Y., 77)."

In the record there is no proof that the law in New Jersey is different and the presumption therefore is that it is the same as in New York. Hynes v. McDermott, 82 N. Y., 41, at 47. And it is shown by Mrs. Lynde's expert (page 73) and uncontradicted, that without a divorce, alimony could not be granted in New Jersey.

Again, as the New Jersey law is not proved, even if it be different than the New York law, this Court will take no notice of it. Hawley v. Donoghue, 160 U. S., 1, at page 5.

In the second place it is not apparent how the rule on this point can be any different in "a special statutory proceeding" from any other proceeding or action. Of course, a state may in matters of procedure in statutory proceedings, require that certain highly technical formalities be complied with. However, that is not the point in Ward v. Boyce, nor in our own case. The attack on each of said judgments was along jurisdictional lines. The defendant in each case complained that he was deprived of his property when he "had no opportunity to litigate the fundamental issue." Thus the guarantee of due process of law was not secured in either case. And it is submitted that this guarantee is no more applicable to a "special statutory proceeding" than to

any other action or proceeding. And so the New York Court holds. Stuart v. Palmer, 74 N. Y., 183. Indeed, in many statutory proceedings, less strictness is required, as property may be taken without personal notice. This rule, however, (Point III.) does not apply to this case, where a judgment *in personam* has been awarded. We are positive that the rule that governs Ward v. Boyce, governs this case.

Ward v. Boyce, which, so far as the Courts of New York went, should have been decisive in our favor of the present case, holds

"The most that can be said is, that the plaintiff "had notice of a part of the proceedings. * * * "But before she was made a party by such notice, "important questions affecting her had been de- "cided." * * *

"The judgment ought not to conclude here, "when it appears that she was not a party to the "whole proceeding but was brought in at the "end under a permissive provision of the statute, "and at a stage when she had no opportunity to "litigate the fundamental issues in the action. So "we think she was not a party to the former suit "in that full and complete sense which the law "implies, in order to conclude or estop her by the "judgment, in a subsequent litigation." * * *

"It will be seen that the plaintiff, or the moving "party in this Vermont action, was Herrick, and "while there are what might be called two judg- "ments in the same action, the last was supple- "mental to the first, and properly, the proceeding, "from commencement to end, must be regarded as "one action. But the plaintiff was not in any way "made a party to it, until the principal fact had "been adjudged, which was that her husband was "indebted to Herrick. Neither the husband nor "the wife had any opportunity to contest that fund-

"amental element in the litigation, and unless that "can be treated as a valid judgment in this juris- "diction the subsequent proceedings for its en- "forcement must fail. It is the same as if a credi- "tor in this State should inaugurate supplemental "proceedings upon a void judgment. Any order "or judgment made in such proceedings would also "be void for want of jurisdiction. It is no an- "swer to say that the plaintiff had personal notice "of the final proceedings against the trustee. "These proceedings rested upon the prior judg- "ment, and unless that is binding upon her the "rest of the proceedings must fail with it. The "proceeding must be regarded as a whole from "the time that the first process was issued until "the adjudication against the trustee."

* * * * * *

Page 200:

"Since there was no jurisdiction of the debtor, "and no opportunity for his wife to litigate the "question upon which all other questions depend- "ed, the judgment ought not to conclude her in a "subsequent action in another jurisdiction."

We thus see that the New York cases are in full accord with the McVeigh case; that the test of the enforceability of a decree is, whether the party was afforded an opportunity to be heard in respect to the issues of a decree which was subsequently awarded. An examination of the record will show beyond all dispute that no such opportunity was afforded Mr. Lynde in this case.

POINT IV.

Inquiry as to the only rational result of defendant's appearance in this action on an ancillary motion after the fundamental issues were determined.

If the defendant had been served in the State of New Jersey with the motion papers to amend the form of the decree, and did not appear in response to said notice, could it be seriously contended that such service rendered the prior void decree valid. As a matter of fact he appeared to oppose the motion and on any rational theory he thereby did no more for the plaintiff than if he had been served in New Jersey with the motion papers.

The distinction is manifest between the effect of an appearance in an action where all the issues are to be tried and an appearance on a motion for the purpose of resisting the amendment of a decree after the main question has been decided and for this reason: Notice is essential to due process of law which secures to a party a hearing. A timely appearance which secures the same thing is waiver of the formal notice, but an appearance after judgment which will not secure a hearing is not due process of law.

It is true the defendant had notice of the judgment against him. Such notice would appear on its face to be of little value to a person who wanted to defend himself in respect to the matters to which he is concluded by the judgment already rendered and not opened. Such a notice is notice after the fair.

If that is due process of law, then any appearance to resist an application for further relief on a

void judgment gives validity to such void judgment.

It is not enough that the owner may by chance have notice or that he may, as a matter of favor, have a hearing; the law must require notice and give a right to a hearing.

Even if in this action, the jurisdictional objection was not raised, it is submitted that the alimony decree herein would not be binding. It is the duty of the moving party to afford the other side an opportunity to be heard on all the issues. In Roller v. Holly, 176 U. S., 398, a judgment *in rem* was obtained in Texas against a resident of Virginia, on five days' notice. The Court held that so short a notice was not due process of law. The suggestion was made, that, if the attention of the Texas Courts were called to the fact that the defendant wanted more time to open the judgment, the Texas Courts would probably have given it to him. This Court, however, said at page 409 of said case: "Very probably, too, the Court "which rendered the judgment, would have set the "same aside, and permitted him to come in and "defend; but that would be a matter of discretion "—a contingency he was not bound to contem- "plate. The right of a citizen to due process of "law must rest upon a basis more substantial than "favor or discretion." And yet, in the present case, by overruling the jurisdictional objection, the Court's discretion was exercised to deny Mr. Lynde the privilege of being heard on the fundamental issue.

See also

Davidson v. Board Ad., &c., New Orleans, 96 U. S., 97.

Stuart v. Palmer, 74 N. Y., 183.

It will be noticed that the plaintiff and the

Courts below have felt compelled to rely upon the appearance we have discussed, they have felt it incumbent to call it a "general appearance," though how that appearance could possibly be more or less than it actually was, that is, an appearance to resist the motion to amend the decree, is not apparent. By it there was no submission to try the issues already determined.

Much confusion is raised in this case by talking of a general appearance. It will be recalled that the only appearance was in response to a motion and it would seem unnecessary to state that the appearance in opposition was for the purposes of resisting the motion. Such an appearance does not carry with it the result of a general appearance before judgment, which will conclude a defendant as to jurisdiction of the person. A *general appearance* has been defined as " a simple and absolute submission to the jurisdiction of the Court" (1 Bouvier Law Dictionary, p. 128, Title Appearance).

How can a person appear for the first time on a motion after judgment except for the purposes of the motion? He cannot appear to try the case.

It will be noted that there is not even an adjudication binding this defendant as to whether the defendant was the husband of the plaintiff. As a matter of fact (page 56) he denies that he was guilty of the charges made by the plaintiff, and for which she claims she is entitled to a divorce. It needs no citation of authority to show that the primary duty is upon the wife to make her home with her husband. If the marital relation were conceded, that surely would not of itself support an action for divorce. A wife must prove her charges and give the defendant an opportunity to establish whose fault it is that the marital relation is disturbed. The defendant has always

claimed that it was through no fault of his own. Surely here was the fundamental issue. Without proof of these facts, there is no basis for the award of alimony. And as we have shown, the complaint itself declares that alimony can only be awarded in connection with a divorce.

Is it conceivable if a plaintiff should allege that one A, for example, was B's agent, and had misappropriated funds, and, if B conceded the amount of the misappropriation but denied that A was his agent, is it conceivable that plaintiff could recover of B without establishing the agency? Of course not. And for the reason that the agency is the fundamental issue.

So in the case at bar, as the lower Court has conceded, the fundamental judgment is void. And in the words of Judge O'Brien, in Marden v. Dorthy, 160 N. Y. 39, "Void things are no things." It therefore follows that plaintiff asks the Courts to enforce a judgment which has no foundation. We submit that such a request is preposterous.

We submit, that to hold, by a so-called general appearance, on a motion after judgment, a void judgment is galvanized into life, is supremely technical and unreasonable. By such doctrine, substance is sacrificed to form and the Courts grasp at shadows.

Is it reasonable to say that, because Mr. Lynde has been heard after a void decree, on the form of the decree, that he thereby forfeits his right to be heard on the merits?

If Mr. Lynde had appeared on a motion, before the decree, the Court would have required him to state whether he appeared for the motion only, or they would have implied that he appeared in the action generally. If, however, the decree is entered in the action, and a motion is made in

which the issues of the action cannot be tried, is it not unreasonable to say that one must indicate the object of his appearance on such a motion?

We have read and re-read Judge Gray's opinion herein (page 115), and confess to an utter inability to follow his reasoning on the point that the defendant, by his appearance on the amendatory motion, ratified (page 115) the void decree of divorce. Judge Gray previously admitted that the divorce decree was void, or, as he expressed it, "was ineffectual against the defendant for any purpose." If the decree was void for every purpose, why is it not void as a basis of an estoppel? What, then, is there to ratify? In Freeman on Judgments, Sec. 117, it is said: "The void judg-"ment is, in legal effect, no judgment. By it no "rights are divested. From it no rights are to be "obtained. Being worthless in itself, all proceed-"ings founded upon it are equally worthless. It "neither binds nor bars anyone. All acts per-"formed under it, and all claims flowing out of it, "are void." * * * "The first and most mate-"rial inquiry in relation to a judgment or decree, "then, is in reference to its validity. For if it be "null, no action upon the part of the plaintiff, no "inaction upon the part of the defendant, no re-"sulting equity in the hands of third persons, no "power residing in any legislative or other depart-"ment of the government, can invest it with any "of the elements of power or vitality."

POINT V.

When Mr. Lynde's jurisdictional objection was overruled to the effect that he had no opportunity for a hearing on the merits, he thereafter contested Mrs. Lynde's right to the amendatory decree on the merits of that proceeding. Mr. Lynde was not heard on the merits of the action. Such contest did not invalidate the jurisdictional objection, as he was not bound to "desert the case and leave Mrs. Lynde to take judgment by default."

On the ancillary motion to amend the form of the decree, Mr. Lynde, as per statement, pages 5 7, raised the jurisdictional objection that the fundamental decree was void, and so Mrs. Lynde was not entitled to alimony. This was overruled. Thereafter Mr. Lynde resisted the amendatory decree on the ground that the claims (page 41) against his father's estate would leave him nothing, and that such amendment was not allowed by the law of practice in divorce cases in New Jersey. The merits of the action, however, were not litigated. At the close of the motion the Court said (page 37), that "the original decree will be amended without being opened." And it is nowhere pretended that the issue attempted to be determined by the pretended divorce decree was in any way passed upon.

Judge Bartlett (page 102) concedes for us that the jurisdictional objection was duly taken. In fact, as we read his opinion, he says that if Mr. Lynde's solicitor had confined himself to that one objection the objection would have been fatal.

But Judge Bartlett holds that Mr. Lynde lost the benefit of that objection by contesting, on the other grounds above set forth, the merits, not of the action, but of that one proceeding.

That we may do Judge Bartlett no injustice, and that this Court may see the grounds of the decision in the only one of the lower Courts that kept in mind the facts of this case, we quote from Judge Barlett's opinion (page 102): "Neither in any paper served by Mr. Potts, "nor in any of the orders made by the Courts in "New Jersey is there anything to indicate that he "intended to restrict his appearance to the single "purpose of denying the jurisdiction of the Chan- "cellor to amend the original decree of divorce. "On the contrary, the testimony which he intro- "duced in the proceeding could only have been "designed to secure a denial of the application on "the merits, for it was intended to show the falsity "of the plaintiff's claim that all provision for "alimony was omitted from the decree by reason "of the neglect of her solicitor to carry out her "instructions.

"Upon the trial of the present case, Mr. Potts "testifies that he did question the jurisdiction of "the Court of Chancery in the amendment pro- "ceeding, on the ground that the defendant had "never been served with process and on other "grounds; and the grounds specified in his petition "on appeal to the Court of Errors and Appeals "also relate to the jurisdiction of the Chancellor. "In no manner, however, did he limit his appear- "ance or action in behalf of the defendant to the "assertion of the proposition that the Court had "never obtained any such jurisdiction over the "person of the defendant as to empower it to "amend the decree. He went further and liti- "gated the application on its merits; and I think

"the learned Judge at Special Term was justified "in holding that he appeared generally in the "cause."

In passing, we ask this Court to notice the lower Court's definition of a general appearance as given in the last sentence of the above quotation. It is conceded that there was no appearance before the entry of the fundamental decree. However, because on an ancillary motion after this void decree, Mr. Lynde *raised more than one objection to the motion*, it is said that he appeared generally. Likewise the Court of Appeals said (page 115): "There cannot be the slightest question but what "his appearance was general."

Recall the situation. Mr Lynde was met with a motion to amend the decree. He said, "I have "several reasons to oppose this motion." In the first place, on the merits of the motion, there is no foundation for the claim, as that decree is void. In the second place, the net value of my estate amounts to nothing, and I am not liable. Can any Court, with any fairness, say that Mr. Lynde must stake all on one defense? This certainly would be a narrow construction.

And in *ex parte* Lange, 85 U. S., 163 at 178, the Court said:

"There is no more sacred duty of the Court "than, in a case properly before it, to maintain "unimpaired those securities for the personal "rights of the individual which have received for "ages the sanction of the jurist and the states-"man; and in such case no narrow or illiberal "construction should be given to the words of "the fundamental law in which they are em-"bodied."

Again, the law is liberal enough to allow a party to use all the cards he holds, and not compel him

to stake all on one particular card. Indeed, any other policy (Point III) would be depriving a man of his property without a hearing. Such ruling would give him only a partial hearing.

In Steamship Co. v. Tugman, 76 N. Y., 207, the defendant brought an action against a corporation foreign to New York. The defendant moved to transfer the case to the United States Courts. The motion was denied. Then, in the New York Courts, the defendant appeared and contested the *merits of the action* before a referee. It was claimed that thereby the defendant waived his right to go to the United States Courts; and in the New York Court of Appeals this view was sanctioned, the Court saying at page 212, "It may "also be remarked that since the order refusing "to remove the case the defendant consented to "the appointment of a referee to determine the "case and submit to his jurisdiction by trying the "action on its merits. It is at least questionable "whether he has not thus waived his right to in- "sist that the removal had been had."

This Court held differently, Justice Harlan saying (Steamship Co. v. Tugman, 106 U. S., 118, at page 122):

"Nor was the jurisdiction of the State Court re- "stored when the company, subsequently, con- "sented to the order requiring the issues to be "heard and determined by a Referee selected by "the parties, or when it appeared and contested "the case, as well before the Referee as in the "State Courts, up to the final judgment. The "right of the company to have a trial in the Cir- "cuit Court of the United States became fixed "upon the filing of the petition and bond. But "the inferior State Court having ruled that the "right of removal did not exist, and that it had

"jurisdiction to proceed, the company was not "bound to desert the case and leave the opposite "party to take judgment by default. It was at "liberty, its right to removal being ignored by the "State Court, to make defense in that tribunal "in every mode recognized by the laws of the "State, without forfeiting or impairing in the "slightest degree its right to a trial in the Court "to which the action had been transferred, or "without affecting to any extent the authority of "the latter Court to proceed. The consent of the "company to a trial by Referee was nothing more "than an expression of its preference—being com- "pelled to make defense in the State Court—for "that one of the several modes of trial permitted "by the laws of the State. It is true that when "the case was taken up by the Referee, as well as "when heard in the Supreme Court of the State "and in the Court of Appeals, the company pro- "tested that the Circuit Court of the United "States alone had jurisdiction after the peti- "tion and bond for removal were filed. "But no such protests were necessary, and "that added nothing whatever to the legal "strength of its position. When the State Court "adjudged that it had authority to proceed, the "company was entitled to regard the decision as "final, so far as that tribunal was concerned, and "was not bound, in order to maintain the right of "removal, to protest at subsequent stages of the "trial against its exercise of jurisdiction. Indeed "such a case would scarcely have been respectful "to the State Court after its ruling upon the point "of jurisdiction had been made."

In Harkness v. Hyde, 98 U. S. 476 at 479, it is said: "Illegality in a proceeding by which juris- "diction is to be obtained is in no case waived by "the appearance of the defendant for the purpose

"of calling the attention of the Court to such ir-
"regularity; nor is the objection waived when be-
"ing urged it is overruled, and the defendant is
"thereby compelled to answer. He is not consid-
"ered as abandoning his objection because he does
"not submit to further proceedings without protes-
"tation. It is only where he pleads to the merits
"in the first instance, without insisting upon the
"illegality, that the objection is deemed to be
"waived."

In these cases the defendants went to trial on the merits of the action; but this Court held that even that fact did not invalidate the jurisdictional objection. They go much further than it is necessary to go in the present case; for Mr. Lynde has never had an opportunity in any Court to be heard on the fundamental issues.

POINT VI.

Mr. Lynde's second marriage could not validate the void decree.

(A) This must be so on general principles of law.

(B) The contrary view is opposed to the provision of the United States Constitution which declares that no person shall be deprived of his property without due process of law.

A.

In the Rigney case (160 U. S., 531) which came from our state to this Court, and which our adversary and the New York Court of Appeals, have cited as an authority against us, it appeared that after the wife had obtained her divorce, Mr. Rigney re-married. It was strenuously insisted that such fact rendered valid the alimony decree. We quote on this point from the opinion in that case of the Presiding Justice at the New York General Term (Rigney v. Rigney, 53 Hun, 457 at 462).

"The defendant admits by his answer that the "Court in New Jersey had jurisdiction to dissolve "the marriage between himself and the plaintiff, "and having admitted this fact, he cannot be "heard to assert that the Court had no power to "grant the incidental relief which naturally fol- "lowed the right to dissolve the marriage. If the "Court had the jurisdiction to make any part of "the decree, it was empowered to make the whole "decree."

When the Rigney case reached the New York Court of Appeals, that Court repudiated the second marriage ratification theory. The Court (Rigney v. Rigney, 127 N. Y., 408, 416) said: "It "is urged that the defendant, by his sub- "sequent marriage and motion to correct "the judgment, recognized its validity in

"all its parts and is estopped from questioning "the right of the Court of Chancery to render a "judgment for alimony and costs. We fail to dis- "cover on what principles these facts can be held "to create an estoppel by conduct, as the plaintiff "neither did, nor omitted to do, anything by reason "of these acts."

Later, the same case came to this Court, and the judgment of the Court of Appeals was reversed (Laing vs. Rigney, 160 U. S. 531). The reversal, however, was not on this point (Hekking vs. Pfaff, 82 Fed. Rep., 402).

In the Pfaff case, at page 404, it was pointed out that the decision of this Court in the Rigney case, did not in the least sanction the doctrine that a second marriage could ratify a void decree. Judge Putnam said:

"The plaintiff relies on Laing v. Rigney, 160 "U. S., 531. A careless reading of that case might "give an impression that the circumstances were "substantially like those at bar; but a careful ex- "amination of it shows beyond all doubt that the "question considered by the Supreme Court was "not one of jurisdiction, but merely one of the form "of proceedings as determined by the local law of "the State where the judgment was rendered, and "in which both parties resided when the proceed- "ings were commenced."

On the general question the Court in the Pfaff case said: "First of all, as the State itself has an "interest in the marriage, its existence or non-ex- "istence cannot be determined by the mere contract "or conduct of the parties, whether operating in "the form of an express agreement or in that of "estoppel, waiver or ratification. In one case as in "the other, it is equally the voluntary act of the "party without the consent of the State. It will be

"found that none of the well considered cases to "which the plaintiff refers turned on the question "whether waiver can validate a decree of divorce "which is actually void, but in each such case "there was a judgment by a Court having juris- "diction, though alleged to be erroneous, or there "was a judgment from which an appeal had been "taken, and which would, therefore, be validated "unless the appeal were sustained. Under such "circumstances Courts would be justified in apply- "ing those equitable rules which enable them to "control to a certain extent inequitable attacks on "judgments by either a writ of error or an appeal. "Anything beyond this, and especially anything "which would enable either one or both parties to "a marriage to validate, under color of estoppel, "waiver or ratification, a pretended divorce, can- "not be held as well considered law.

"The true state of the law seems to us to turn on "more fundamental propositions. If there was "nothing to be ratified, then, of course, the plain- "tiff's whole proposition falls to the ground.

"As South Dakota had undoubted actual juris- "diction to determine the status of the plaintiff, "and has done so by a proceeding which is not "erroneous under the laws of that State, so that "she was divorced from the defendant and was "no longer his wife, the consequence seems inevi- "table that the defendant, by marrying, simply "accepted the fact of such status of the plaintiff "as thus fixed, and he was neither asked to do "anything, and in fact did not do anything, in the "nature of ratification, waiver or estoppel (*Bishop "on Marriage, Divorce and Separation*, Vol. 2, "Sec. 137). Had the decree of the Court of South "Dakota been invalid under the laws of that State, "then there would have been an opportunity for "waiver or ratification on the part of the defend-

"ant; but, as it was not, he merely accepted the "condition of things as he found them, and there- "fore he has done no act of waiver or ratification, "nor anything else, which could lay the basis for "any estoppel, or for any other method of preju- "dicing his rights as they existed before his sub- "sequent marriage.

"This is undoubtedly the true solution of this "case; but, if the subsequent marriage of the de- "fendant can operate as claimed by the plaintiff, "in the way either of waiver, ratification or es- "toppel, yet it would seem that, by all the ordi- "nary rules of law, it would operate as such "only in favor of the condition of things as it "existed when he was married. The defendant "did not by his marriage enter an appearance "in the Court of South Dakota, or give "it jurisdiction over him; and all its after de- "crees affecting his pecuniary interests were as "much without jurisdiction against him personally "as had been its prior proceedings. The plaintiff "has produced to us no well considered decision, "nor proposed to us any principle of law which "would compel us to impose on the defendant an "assumption by him either by waiver, ratification "or estoppel, of the after proceedings of the Court "in South Dakota, without limitation, and with- "out jurisdiction over his person or property. "The law on this point seems so clear against the "plaintiff that it is not necessary to enlarge on it "further."

The doctrine that a second marriage can trans- form a void decree into a valid *in personam* de- cree, is, to our thinking, wholly untenable. Let us first recall the facts in this case. Mrs. Lynde, herself, is the moving party and obtains a decree to the effect (pages 10–11) that "petitioner

"Mary W. Lynde and the said defendant Charles "W. Lynde, be divorced from the bond of matri- "mony for the cause aforesaid and the marriage "between them is hereby dissolved accordingly, "and the said parties and each of them are and is "hereby freed and discharged from the obligations "thereof." Thereafter Mr. Lynde remarries. Surely no estoppel can operate here, for the well recognized essentials of an estoppel are here absent. Bigelow in his Work on Estoppel (5th Ed.) at page 26, says, that to create an estoppel the following facts must actually or virtually occur: "1. There must have been false representation "concerning material facts. 2. The representation "must have been made with knowledge of the "facts. 3. The party to whom it was made must "have been ignorant of the truth of the matter. "4. It must have been made with the intention "that it should be acted upon. 5. It must have "been acted upon to the damage of the party act- "ing."

It is to be remarked that for an estoppel every one of these five conditions must be fulfilled. We submit that it is clear that in this case every one of the five conditions is absent.

Mr. Bigelow, in the same work, also shows the requisites of a waiver. He says, at page 29, "Another kind of estoppel by conduct, may arise "by a party to a contract or transaction inducing "the other to act in the belief that the former will "waive certain rights he might otherwise maintain "against the latter. This estoppel does not con- "sist in misrepresentation by the party to be "estopped, nor does it require that the opposite "party should be ignorant of the facts. Waiver "by an underwriter, of the terms of an insurance "contract, is an example; encouraging a licensee to "expend money on one's premises, in the belief

"that the former will thereby acquire rights or "privileges, is another."

There is no principle that runs through these cases that can apply to the present case. Again, how can Mr. Lynde have waived anything, or be estopped, when as soon as he came into the case he raised the jurisdictional objection as to the Court's power to act.

A few words as to the ratification doctrine. A marriage, is of course, a contract. Let us compare our case with an analagous contract case. Suppose an employer desires an agent for a certain position. He seeks one, A, who would fill the position. A says that he will be a faithful, competent servant as long as he is able to work, but that if he works while his health permits, he must be secured a certain sum for life, whether or not his health allows him to work. The agent's terms are accepted, and the agent begins work. At the end of three or four years, the agent leaves, as he says, for good cause. The employer asserts that the agent had no excuse for leaving. Soon thereafter, the employer hires a man to take his place. Has such fact the remotest bearing on the point as to whether the breaking of the first contract was the employer's fault? Has Mr. Lynde's second marriage the remotest connection with the question as to whether he deserted his first wife, after she obtained a decree which had in it the provision that (*supra*) each of the parties to the decree was discharged from the obligations thereof?

Again, even if it were true that Mr. Lynde, by his second marriage, recognized the validity of the divorce, yet he did not thereby say that he would pay Mrs. Lynde the alimony that was awarded by the void decree. If it were held that he were guilty of bigamy, that of course would be a matter

to be settled between him and the State; but it is absurd to say, that because of his infraction of the criminal law, Mrs. Lynde is excused from proving her cause of action in a civil suit. For aught that appears in this record, if both parties were heard on the merits of the action, the Court might find them both at fault. Mr. Lynde (page 56) has sworn that he was not at fault.

The authorities have settled the doctrine that there is no inconsistency in the view that, as far as the dissolution of the martial status goes, a divorce may be valid and still be void as a basis for a judgment in *personam*.

In Cooley, on Constitutional Limitations at page "499, it is said: "The Courts of the State where "the complaining party resides, have jurisdiction "of the subject matter, and if the other party is "a non-resident, they may be authorized to pro-"ceed without personal service of process. The "publication, which is permitted by the Statute, "is sufficient to justify a decree; in these cases "changing the status of the complaining party, "and thereby terminating the marriage." * * *

"But in divorce cases, no more than in any "other, can the Court make a decree for the pay-"ment of money by a defendant not served with "process and not appearing in the case, which "should be binding upon him personally."

Bishop on Marriage and Divorce, 6th Ed., Vol. 2, Sec 159, reads: "A dissolution is only *in rem* "as respects the status of marriage; as to property "rights and personal claims, it is *in personam*. "Hence, the *ex parte* divorce, where there is neither "service of process within the jurisdiction nor ap-"pearance, affects only the status and whatever "depends directly thereon; not those collateral "and personal consequences which require for "enforcement a judicial decree."

"This distinction between the right or jurisdic-
"tion to dissolve the marriage and to order money
"payments, transfers of property and the like be-
"tween the parties has often been recognized, and
"it is alike established in authority and just in
"principle. The only questions open to contro-
"versy relate to the classification of some practical
"things. As to alimony—alimony exists only by
"judicial decree. Therefore, all opinions concur
"in what is said above, that it cannot be validly
"awarded in a mere *ex parte* divorce suit *in rem*,
"where the defendant's domicile is in another
"State."

Freeman on Judgments, Section 584, reads: "But
"a sentence of divorce has, or may have, a dual
"nature. It is a decree *in rem* so far as it fixes
"the status of the parties by dissolving their mar-
"tial obligations. But so far as it disposes of any
"other matter than the marriage relation, it is *in*
"*personam*."

The New York Court of Appeals in the Rigney case, 127 N. Y. at page 412, adopted this same view and cited as authorities, decisions of numerous State Courts.

We have attempted to show that the alimony decree herein cannot be sustained on the theory that Mr. Lynde appeared to resist an ancillary motion after the void decree of divorce. This leaves open the question as to whether the New York Courts will sustain said alimony decree because of Mr. Lynde's second marriage. This is a question of general law. We have shown above, not only that such doctrine has no legal basis but also that the highest Court in New York has declared against such doctrine. In Neilson v. Lagoon, 14 How. 110 it is held that this Court will not assume that a State Court will decide incorrectly a general principle of law.

B.

The doctrine that Mr. Lynde's second marriage could validate the void decree, is obnoxious to the provision of the United States Constitution which declares that no person shall be deprived of his property without due process of law.

We pass the question as to whether in any case, it is possible to vindicate, on any logical ground, the doctrine that a second marriage can ratify a previous divorce, and assert that in this case, such ratification is impossible, as it would take away Mr. Lynde's property without affording him any opportunity to show that he should not be deprived thereof. We need not repeat at length the facts to show that Mr. Lynde never had a hearing on the fundamental issue.

It will not do to say that if for any reason the New Jersey Court had jurisdiction to decree the divorce upon service of process by publication, and so declare the status of the parties in New Jersey, that therefore the matter determined in the absence of the defendant may be a basis for a personal judgment against him. Legislative or judicial declarations in New Jersey upon that subject have no binding force or effect upon the Courts of other jurisdictions. As previously pointed out, it has been determined that a judgment *in personam* cannot be obtained save after personal service or appearance by the defendant. It must follow, then, that it is impossible for State Courts by any refined theory as to ratification, &c., to take away Mr. Lynde's property (Insurance Co. v. The Treasurer, 11 Wall, 204). If he has has had no hearing he is protected by the United States Constitution, and that instrument displaces all laws, so far as they are in conflict with it (Hanenstein v. Lynham, 100 U. S., 483, at page 488).

The extent of the power of this Court to pass on constitutional questions was much discussed in Murdock v. City of Memphis (87 U. S., 591), and the conclusion was reached that no State Court could nullify that power by overriding the constitutional question. At page 636 Justice Miller said: "But if it be found that the issue raised by "the question of Federal Law is of such controlling "character that its correct decision is necessary to "any final judgment in the case or that there has "been no decision by the State Court of any other "matter or issue which is sufficient to maintain "the judgment of that Court without regard to the "Federal question, then this Court will reverse "the judgment of the State Court and will either "render such judgment here as the State Court "should have rendered or remand the case to that "Court, as the circumstances of the case may re-"quire."

Even the police power of the State must be so exercised as not to interfere with any constitutional rights (Matter of Jacobs, 98 N. Y., page 98; Minnesota v. Barber, 136 U. S., 313).

POINT VII.

Laing v. Rigney is clearly distinguishable from the case at bar, as in that case the defendant appeared and answered before the trial of the fundamental issue; and thereafter was himself the moving party upon a motion in relation to the decree therein. In the present case Mr. Lynde did not know of the decree till after its entry, and then appeared to resist the amendment to its form, but was denied an opportunity to contest its fundamental issue.

This brief would be incomplete without a reference to Laing v. Rigney, 160 U S., 531, for of that case Judge Gray says (page 116), that it "is much in point" against us.

In the Rigney case, when the plaintiff brought her original action for divorce, *the defendant appeared and filed his answer.* He was thus regularly in Court at the commencement of the litigation.

Thereafter the plaintiff filed a supplemental bill, alleging different acts of adultery, and at the trial only those acts of adultery set up in the supplemental bill were proved. Thereafter plaintiff brought an action in New York against the defendant who at the time resided there. Defendant's defence was that by the New Jersey Chancery practice it was necessary to serve the defendant with the supplemental bill in New Jersey, or secure his appearance *de novo* after that bill was filed. Defendant called an expert on New Jersey law, who so testified. At the trial, however, after the expert's testimony, defendant's attorney of-

fered in evidence the Chancery Rules in New Jersey, presumably to bear out his expert's testimony.

Judge Follett speaking for the New York Court of Appeals and relying on the testimony of the New Jersey expert, held that the New Jersey judgment could not be enforced in New York inasmuch as the supplemental bill had not been served on defendant in New Jersey and the defendant did not appear in response to such bill.

On the appeal to the United States Supreme Court it was held that the Chancery Rules offered in evidence by the defendant contradicted defendant's expert and that those rules and the Chancellor's own opinion, he having jurisdiction, were better evidence of New Jersey Chancery practice than the expert's testimony, and the judgment was reversed.

It was said by Justice Shiras, in Laing v. Rigney, *supra*, at page 545: "As this record discl[o]s "that the defendant was served with process under "the original bill, and appeared by counsel and "made answer, and was personally served with a "copy of the supplemental bill and with an order "to plead, and, after permitting himself to be de-"faulted, did appear by counsel and procured the "vacation of the original decree and the enrollment "of the decree amended in accordance with his "own motion, it may fairly be said that he "both had an opportunity to be heard, and was "heard."

As to the present case, Mr. Lynde was in Australia *and was not heard* for (page 83) he did not know of the action until *after the entry of the decree* and (page 60) he had been served therein by publication. He had *no* opportunity to be heard, for (see statement, pages 5 7) on the amendatory motion, he raised the jurisdictional objec-

tion, that the decree of divorce was void, and was afforded no opportunity to contest the issue therein settled.

In the Rigney case, as the Court *at the outset* had jurisdiction of Mr. Rigney, if Mr. Rigney was aggrieved his remedy was by appeal. Justice Shiras, at page 542, says: "In Cornett v. Wil-"liams, 20 Wall, 226, 249, where, in a Circuit Court "of the United States, an attempt was made to "destroy the effect of a judgment rendered by a "County Court by alleging error, this Court said: " 'The power to review and reverse the decision so "made is clearly appellate in its character, and can "be exercised only by an appellate tribunal in a "proceeding directly had for that purpose. It "cannot and ought not to be done by another "Court, in another case, where the subject is pre-"sented incidentally and a reversal sought in "such collateral proceeding. The settled "rule of law is that jurisdiction hav-"ing attached in the original case "everything done within the power of that juris-"diction, when collaterally questioned, is to be "held conclusive of the rights of the parties, unless "impeached for fraud. Every intendment is made "to support the proceeding. It is regarded as if "it were regular and irreversible for error. In the "absence of fraud no question can be collaterally "entertained as to anything lying within the juris-"dictional sphere of the original case. Infinite "confusion and mischiefs would ensue if the rule "were otherwise."

Notwithstanding the care with which it is pointed out in the above quotation that those remarks are all predicated upon the fact that the jurisdiction attached in the original case, Judge Gray cites this Rigney case as an authority against Mr. Lynde, who, as we have shown in the above

statement, was without opportunity to be heard on the fundamental issue. Justice Gray says (page 116): "In other words, the Supreme Court of the "United States held that the New Jersey Court "having once acquired jurisdiction of the defend- "ant in the action, whether it retained that juris- "diction, so as to render the final decree in the "proceeding leading thereto, was a question de- "pending upon the law of that State, which could "not be attacked collaterally.

"Laing v. Rigney is much in point; inasmuch "as jurisdiction of the defendant, in this case, "having been obtained in the proceeding, it was "retained by the Court until it made the final de- "cree. The jurisdiction conferred the power to "render the decree and it will be regarded as valid "and binding until set aside in the Court in which "it was rendered."

These remarks are true enough of the Rigney case but are irrelevant to this case. In this case as we have shown in Point III by decisions of this Court, if the New Jersey Court ever had jurisdiction of Mr. Lynde to award alimony, it lost it when it overruled his jurisdictional objection to the effect that the fundamental decree was, as to him, void and afforded him no opportunity to be heard on the issue therein settled and made its order without affording such opportunity.

Again in the Rigney case, Justice Shiras says, at page 544: "It is contended on behalf of the plain- "tiff in error that, even if the defendant could not "have been personally bound by a decree based "upon the supplemental bill because a subpœna "thereunder had not been served upon him within "the State of New Jersey, yet that, as the defend- "ant after the entry of such a decree against him, "appeared in the New Jersey Court by counsel,

"and procured a modification of the decree, he "thereby subjected himself to the decree as "amended."

* * * * * *

"As the appearance of the defendant was not "for the purpose of objecting to the jurisdiction "of the Court, but was rather in the nature of an "appeal to its jurisdiction, and as the objection "successfully made to the decree as originally en- "rolled was restricted to one of its recitals, and "did not attack the decree in the respect that it "adjudged that he should pay the costs and ali- "mony, there is force in the view that he thereby "waived any right to further object to the decree. "At all events, he could not successfully attack "the decree collaterally in a Court of different "jurisdiction, but his remedy, if any he had, "would be by way of appeal."

In our case Mr. Lynde was not the moving party, but appeared in opposition to Mrs. Lynde's motion, and raised his said jurisdictional objection at the outset, and throughout the case, as we have seen in the statement, and further did not in the least waive said objection as we have shown in Point V.

Again in our case, as we have shown in Point I, our point is nothing, if not jurisdictional. Of the Rigney case Justice Putnam in the Pfaff case, *supra* (58 Fed. Rep., 402), said a careful examination of the Rigney case "shows beyond all doubt "that the question considered by the Supreme "Court was not one of jurisdiction, but merely one "of the form of proceedings as determined by the "local law of the State where the judgment was "rendered, and in which both parties resided when "the proceedings were commenced." Under these circumstances, of how little avail it should have

been for Mr. Rigney to resist that decree in another State, is shown by the following quotation:

In Cooper v. Reynolds, 10 Wall., 308, the Court said, "It is of no avail to show that there are "errors in the record, unless they be such as prove "that the Court has no jurisdiction of the case, or "that the judgment rendered was beyond its "power. This principle has often been held by "this Court and by all Courts, and it takes rank "as an axiom of law."

The second marriage question common to both cases we have discussed in Point VI.

It will be remembered that in the Rigney case the appearance was *before* the issues were determined and in the case at bar there was no appearance and no valid service until *after* the decree sought, to be amended. The distinction between the two cases is thus very broad.

The opinion of the Appellate Division dwells at length (pages 100–104) on the question as to whether there was an appearance by the defendant. It will be remembered, however, that all these observations are directed to the question whether there was an appearance on a *supplemental* motion, after the *fundamental* issue, to wit, the alleged desertion on the part of the defendant was determined by the very decree which elsewhere in said opinion (page 101) the lower Court declared was a *void decree*.

When Judge Gray said that the Rigney case was, as to the present case, "much in point," we submit that he overlooked certain broad, essential and supreme distinctions between the two cases.

POINT VIII.

The pleadings herein required Mrs. Lynde to show all essential jurisdictional facts which would make the alimony decree valid.

We know that the State Courts are the ultimate tribunals on questions of pleadings therein and that (Hawley v. Donohue, 116 U. S., 1), in this present case this Court takes judicial notice of the decisions of the New York Courts on questions of pleadings. Our object in inserting a point in this brief on the pleadings is to show that by the New York law, the answer herein threw the burden on Mrs. Lynde to prove all facts requisite to show jurisdiction in the New Jersey Court of Chancery.

The answer (page 57) denied the allegations of jurisdiction (page 6) set up in the complaint. Jurisdiction was again effectively denied (page 57) by a direct allegation to the contrary (Abbott's Trial Brief on Pleadings, Sections 559 and 758. Crasto v. White, 52 Hun, 473. Pomeroy's Code Remedies (3d Ed.). Secs. 624–628). This made it necessary for Mrs Lynde to prove all essential jurisdictional facts. Abbott on Pleadings, Sec. 991, says, "A general denial imposes upon plain-"tiff the burden of proving every fact essential to "sustain a recovery."

Nul tiel record and *nil debet* are common law forms of pleading which in all actions, including actions on judgments of other States, have no place in the system of pleading now in vogue in New York.

> Pomeroy Code Remedies (3d Ed.), Section 682.

Ferguson v. Crawford, 70 N. Y., 253, at 269.
Abbott's Trial Brief on the Pleadings, Secs. 611 and 614.

This Court allows a State Court to apply its new method of pleading to actions on foreign judgments or decrees.

Commercial Bank v. Rochester, 82 U. S., 639.
Hill v. Mendenhall, 88 U. S., 453.
Hardy v. Johnson, 68 U. S., 37.
Judkins v. Union Mutual Ins. Co., 37 N. H., 470.

The answer herein was a denial of Mrs. Lynde's allegations of jurisdiction and thus threw the burden on her to establish all essential facts of jurisdiction.

No such facts have or can herein be shown, and Mrs. Lynde is entitled to no presumption to the contrary.

It is asked that the judgment of the lower Courts be reversed.

GEORGE S. INGRAHAM,
Attorney for Plaintiff in Error.

MARY W. LYNDE,
Plaintiff-in-Error,

vs.

CHARLES W. LYNDE,
Defendant-in-Error.

The New York Special Term required Mr. Lynde to give security for all future payments of alimony. In default thereof, a receiver of his property was directed to make such payments. The higher New York Courts reversed this portion of the lower judgment.

Mr. Lynde in the previous brief has given his reasons for his belief that the decree of alimony herein is void *in toto*. If he be mistaken, the contention is, that this Court will not control the discretion of the New York Courts as to how Mrs. Lynde's judgment shall be enforced.

Metcalf v. Waterhouse, 153 U. S., 671, at 675, holds:

"The point might have been shortly dismissed with this safe declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits."

Hanley v. Donoghue, 116 U. S., 1, at page 4, says:

"Judgments recovered in one State of the Union when proved in the Courts of another differ from

judgments recovered in a foreign county in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and of the parties" (citing Buckner v. Finlay, 2 Pet., 592; McEmoyle v. Cohen, 13 Pet., 312, 324; D'Arcy v. Ketchem, 11 How., 165, 176; Christmas v. Russell, 5 Wall, 290, 305; Thompson v. Whitman, 18 Wall., 457).

On this point Mr. Lynde further relies on the cases cited (fols. 189–195 and 210–213) in the opinions below.

GEORGE S. INGRAHAM,
Attorney for Defendant-in-Error.